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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8501.

SPECIAL CALENDAR

WASHINGTON GAS LIGHT COMPANY, *Appellant*,

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Appellee*.

and

No. 8502.

SPECIAL CALENDAR

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Appellant*,

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Appellee*.

and

No. 8503.

SPECIAL CALENDAR

WASHINGTON GAS LIGHT COMPANY, *Appellant*,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Appellee*.

and

No. 8504.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Appellant*,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT WASHINGTON GAS LIGHT COMPANY IN NOS. 8501 AND 8503.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

Endorsed: Filed Nov. 18, 1942. Charles E. Stewart, Clerk.

3 United States District Court for the District of Columbia

No. 17805.

JAMES F. BYRNES, Director of Economic Stabilization, *Appellant*,

By LEON HENDERSON, Price Administrator of the Office of Price Administration,

v.

JAMES H. FLANAGAN, GREGORY HANKIN, and C. W. KUTZ, Being the Public Utilities Commission of the District of Columbia, *Appellees*.

Petition of Appeal

Now comes James F. Byrnes, Director of Economic Stabilization, by Leon Henderson, Price Administrator of the Office of Price Administration, this 18th day of November, 1942, and files this appeal and alleges that appellant is a party affected by the decision and order of the Public Utilities Commission of the District of Columbia, dated October 13, 1942 (Exhibit A hereto), proposed to be made effective as of September 1, 1942, determining, fixing, and ordering shedules of increased rates and charges for the sale of gas in the City of Washington, District of Columbia, by the Washington Gas Light Company; that no notice of such proposed increase was given by the Washington Gas Light Company prior to the entry of said order, but that on October 15, 1942, the Washington Gas Light Company, acting pursuant to the provisions of the Act of October 2, 1942, (Pub. Law 729, 77th Con.—2nd Sess.), amending to the Emergency Price Control Act of 1942, filed notice of such proposed increased rates and charges and later consented to intervention by the Director of Economic Stabilization;

4 that on October 19, 1942, a date subsequent to said decision and order, appellant filed a petition (Exhibit B) praying that the order of October 13, 1942, be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that appellant be allowed to intervene and to file a brief, which petition was denied by the Commission by its decision and order of October 23, 1942 (Exhibit C), excepting that said Commission did permit appellant the opportunity of presenting evidence of a very limited nature and did permit him to intervene for such purpose; that on October 31, 1942, appellant filed a petition (Exhibit D) praying for an amendment of said order of October 23, 1942, to provide the specific relief requested in said petition of October 19, 1942, which petition of October 31, 1942, was denied by the Commission by its order of November 9, 1942 (Exhibit E); and that on November 12,

1942, appellant filed a petition for reconsideration (Exhibit F) with the Commission pursuant to paragraph 64 of the Act of March 4, 1913, as amended (D. C. Code, Title 43, Sec. 704; 37 Stat. 988, Chap. 150, Sec. 8; 49 Stat. 882, Chap. 742, Sec. 1), which petition was denied by the Commission by order dated November 16, 1942 (Exhibit G).

Pursuant to paragraph 65 of said Act of March 4, 1913, as amended, appellant assigns the following reasons for this appeal:

1. The Commission's decision and order of October 13, 1942, proposed to be made effective as of September 1, 1942, determining, fixing, and ordering schedules of increased rates and charges for the sale of gas by the Washington Gas Light Company is illegal because:

a. Said decision and order was made without giving the appellant the opportunity of full intervention as contemplated by the said Act of October 2, 1942, amending the Emergency Price Control Act of 1942.

b. Said decision and order is contrary to the program of the Federal government to prevent inflation and to stabilize the cost of living by preventing all further and avoidable increases thereof, in that it was entering without
5 a clear and convincing showing that the existing rates and charges were not sufficiently compensatory under present economic conditions or that the Washington Gas Light Company would be subjected to undue hardships if the existing rates and charges were continued in effect.

c. Said decision and order was entered in complete and utter disregard of the Government's program to control inflation and to stabilize the cost of living by preventing all future and avoidable increases thereof as provided by Congress in the Emergency Price Control Act of January 30, 1942, as amended by the said Act of October 2, 1942, and as enumerated by the President in his Executive Order No. 9250, dated October 2, 1942, and the policies of the Director of Economic Stabilization and the Office of Price Administration.

2. The Commission's decision and order of October 23, 1942, is illegal because:

a. Said decision and order denies to the appellant the full intervention contemplated by the said Act of October 2, 1942.

b. Said decision and order, insofar as it limits the participation by the appellant in this proceeding, constitutes an unlawful and improper restriction of the rights given to the appellant by the said Act of October 2, 1942, and the said Executive Order No. 9250.

c. Said decision and order is unlawful and improper in that it restricts the appellant to the presentation of "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401" of October 13, 1942.

d. Said decision and order fails to provide for the vacation of the order of October 13, 1942, proposed to be made effective as of September 1, 1942, determining, fixing, and ordering schedules of increased rates and charges for the sale of gas by the Washington Gas Light Company, which was entered without opportunity of intervention by the appellant.

6 The appellant is aggrieved by said decisions and orders of October 13, 1942, and October 23, 1942, issued by the Public Utilities Commission of the District of Columbia and files this petition for the purpose of obtaining a review of such decisions and orders by this honorable Court pursuant to paragraph 65 of the Act of March 4, 1913 (D. C. Code, Title 43, Sec. 705; 37 Stat. 989, Chap. 150, Sec. 8; 49 Stat. 882, Chap. 742, Sec. 2). The purpose of this appeal is to prevent the Washington Gas Light Company from effecting the schedules of increased rates and charges which have been determined, fixed and ordered by said Commission and to save the appellant and the consuming public from this increase in the cost of living. Such purpose would be nullified and defeated if said company were allowed to demand and receive such increased rates and charges pend-

ing the determination of this appeal, and the appellant and the consuming public would suffer a substantial and irreparable property loss if they were required to pay such increased charges pending such determination. The efforts of the appellant to prevent increases in utility rates and charges which constitute an element in the cost of living will be greatly impaired if the said company is permitted to increase its rates and charges to the consuming public under the principles and terms set forth in the said order of October 13, 1942.

Wherefore, the Director of Economic Stabilization prays that this honorable Court will:

a. Specifically order that these proceedings shall operate as a stay of the Commission's order of October 13, 1942.

b. Order that an immediate hearing be held upon the above request for a stay, and fix a date for such hearing not earlier than three days after the date of filing hereof.

c. Issue an order containing such provisions as it
7 deems advisable for the preservation of records or accounts and the impounding or otherwise securing of moneys necessary to insure the refund to the customers of said company of the amounts paid over and above those which would be paid under the presently existing schedules of rates and charges, if the Court considers that the operation of said order of October 13, 1942, should not be stayed pending the determination of this appeal.

d. Reverse, annul, and set aside said decisions and orders of said Commission.

e. Grant such further and different relief as to this honorable Court may seem proper under the circumstances of the case.

JAMES F. BYRNES,
Director of Economics Stabilization.

By LEON HENDERSON,
Price Administrator of the Office of Price Administration.

DAVID GINSBURG,
General Counsel.

NATHANIEL L. NATHANSON,
Assistant General Counsel.

HARRY R. BOOTH,
Utilities Counsel.

W. RUSSELL GORMAN,
Attorney.

Legal Division,
Office of Price Administration.

159 Endorsed: Filed Dec 10 1942 Charles E. Stewart, Clerk.

Answer of Washington Gas Light Company.

Comes now Washington Gas Light Company (hereinafter referred to as the "Company"), this 10th day of December, 1942, and files this answer to the Petition of Appeal filed in the above-entitled proceeding, and respectfully states as follows:

1. The Company is an interested party in the above proceeding in that Order No. 2401 of the Public Utilities Commission of the District of Columbia, dated October 13, 1942 (Exhibit A to the Petition) determined, fixed, and ordered rates, tolls, and charges to be charged by the Company for gas service in the District of Columbia.

2. The Company denies the averment that the Petitioner is a party affected by said decision and order of the Commission dated October 13, 1942.

3. The Company admits the averment that no notice was given the Petitioner of the proposed increase prior to the entry of said decision and order of October 13, 1942; the Company admits that notice was given the Petitioner on October 15, 1942 of the proposed increased rates and

charges; and the Company admits that it later consented to intervention by the Director of Economic Stabili-
160 zation.

4. The Company admits the averment that the Petitioner filed a petition with said Commission on October 19, 1942, praying that the Order of October 13, 1942 be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the Petitioner be allowed to intervene and file a brief; but the Company denies that said petition was denied by said Commission by its decision and order of October 23, 1942.

5. The Company admits the averment that the Petitioner filed a petition with said Commission on October 31, 1942, praying for an amendment to said Order of October 23, 1942, and the Company admits that said petition was denied by the Commission by its Order No. 2418, dated November 9, 1942.

6. The Company admits the averment that the Petitioner filed a petition for reconsideration with said Commission on November 12, 1942, and admits that said petition was denied by the Commission by Order No. 2422, dated November 16, 1942.

7. The Company denies each and every averment set forth in paragraph 1 of the petition, including subparagraphs a, b, and c thereof.

8. The Company denies each and every averment set forth in subparagraphs a, b, and c of paragraph 2 of the Petition.

9. The Company denies the averment set forth in subparagraph d of said paragraph 2, that said decision and order of October 13, 1942 was entered without opportunity of intervention by the Petitioner, and the Company admits the remaining averments of said subparagraph d.

10. The Company denies each and every averment set forth in the last unnumbered paragraph of the Petition, except that the Company states that it is without knowledge

or information sufficient to form a belief as to the purpose of the appeal.

11. And for further answer to said Petition the Company respectfully avers as follows:

161 That on March 20, 1942, pursuant to the provisions of its Order of December 13, 1935 (Order No. 1458) the Public Utilities Commission of the District of Columbia ordered that an engineering and accounting investigation be made relative to the rates, tolls, charges, etc., of the Company to be effective for the rate year beginning September 1, 1942, and gave public notice of its intention to hold a public hearing on the subject matter of the investigation. On July 21, 1942 said Commission gave public notice that it would hold a formal public hearing on August 18, 1942 relative to the rates, tolls, charges, etc., of the Company to become effective September 1, 1942 in accordance with the sliding scale arrangement established by Order No. 1458. On July 29, 1942 the Commission gave public notice that a prehearing conference would be held August 11, 1942 preparatory to the hearing set, as aforesaid, for August 18, 1942. On August 14, 1942 the prehearing conference was held, and was attended by members of the Commission, representatives of the staff of the Commission, representatives of the Company, and Utilities Counsel of the Office of the Price Administration. On August 18, 1942 the aforesaid hearing, being the annual hearing for rates of the Company, set under the sliding scale arrangement, began before the Commission. The Utilities Counsel of the Office of Price Administration entered his appearance and filed a petition of the Price Administrator for leave to intervene. The Emergency Price Control Act of 1942, approved January 30, 1942, provides: "That nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility * * * (Sec. 302(c)). That provision remains in the statute to this day, being unchanged by the amendatory Act of October 2, 1942, hereinafter mentioned.

The Office of Price Administration was created by the Emergency Price Control Act of 1942, and the authority, duties, and functions of said Office and of the Price Administrator are defined and limited thereby. Nevertheless, the Company interposed no objection to the intervention of the Price Administrator, and the petition was forthwith granted by the Commission. Thereafter, the hearing con-
162 tinued on August 19, September 4, September 8, September 11, and September 14, the postponements to September 4, to September 11, and to September 14 being granted at the request of Utilities Counsel of the Office of Price Administration. During the course of the hearing, said Utilities Counsel cross-examined witnesses, presented testimony both oral and written, and made numerous arguments. Said Utilities Counsel from time to time requested and moved the Commission to enlarge and change the issues in the proceeding as defined by the Commission, and to proceed to re-examine the Order of the Commission of December 13, 1935 (Order No. 1458), all of which requests and motions were denied by the Commission. Except that testimony and argument of all parties, including the intervening Office of Price Administration, were limited to the issues in the proceeding as defined by the Commission, no other limitation or restriction whatsoever was imposed at any time upon the Price Administrator or its counsel.

Upon the conclusion of the hearing on September 14, all parties, including the Price Administrator, were given until September 25 for the filing of briefs. On September 25, the Utilities Counsel of the Office of Price Administration filed a brief on behalf of the Price Administrator and the Office of Price Administration.

On September 24, the Fort Davis Citizens' Association and the Washington League of Women Shoppers filed petitions for reopening of the case, and on September 28, the Office of Price Administration, through its aforesaid Utilities Counsel, filed a petition that the case be reopened. The Commission ordered that the case be reopened, and the re-

opened hearing was held, pursuant to notice, on September 30. On that date the Utilities Counsel of the Office of Price Administration filed a supplemental brief on behalf of the Price Administrator and the Office of Price Administration. Thereupon the hearing was concluded, and the matter taken under advisement by the Commission.

On October 2, 1942 the President approved the amendment to the Emergency Price Control Act of 1942, which provided in part as follows:

163 "Provided, That no common carrier or other public utility shall make any general increases in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

On October 13, 1942, the Commission issued its opinion and Order, No. 2401, in Formal Case No. 316, prescribing schedules of increased rates, tolls, and charges to be charged by the Company for gas service in the District of Columbia. In said Order the Commission stated that, under the terms of the sliding scale arrangement (Order No. 1458), the rates, tolls, charges, rules, regulations, and conditions of service prescribed in said Order (No. 2401) became effective as of September 1, 1942, but also directed the attention of the Company to the above quoted provision of the Act of October 2, 1942.

Pursuant to the provisions of the Act of October 2, 1942, on October 15, the Company notified the Director of Economic Stabilization of the increase in rates and charges of the Company. By Directive No. 1, the Director of Economic Stabilization designated the Price Administrator of the Office of Price Administration as his representative to receive notices of increases in common carrier or other public utility rates, and charges, and to intervene and participate

in proceedings before Federal, state, and municipal authorities. On October 19, 1942, Utilities Counsel (the same person who had participated in the hearings before the Commission), for the Price Administrator of the Office of Price Administration, already, as above-shown, a party intervener in the proceeding, now acting on behalf of the Director of Economic Stabilization, filed a petition with the Commission praying that Order No. 2401, dated October 13, 1942, be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the petitioner be allowed to intervene and file a brief in the reopened proceedings. By its Order No. 2404, dated October 23, 1942, the Commission ordered that the record in the case be reopened for the purpose of
164 receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and granted intervention for such purpose. The reopened proceedings were set for formal hearing on November 2. On October 30, by letter addressed to the Commission, the Company consented to the intervention of the Office of Price Administration on behalf of the Director of Economic Stabilization.

On October 31, Utilities Counsel for the Price Administrator of the Office of Price Administration, acting on behalf of the Director of Economic Stabilization, filed a petition with the Commission for an amendment to Order No. 2404, dated October 23, 1942, and for a stay of Order No. 2401, dated October 13, 1942, alleging that said Order No. 2404 illegally restricted the right of intervention by the Director of Economic Stabilization. The hearing was reopened on November 2, and Utilities Counsel for the Price Administrator was given the opportunity of adducing evidence. He insisted that the Commission first rule on the petition filed on October 31, which the Commission did, denying the petition. Utilities Counsel for the Price Administrator then

admitted that he was not prepared to present evidence and asked that he be given a reasonable opportunity to determine the future course of the Price Administrator with respect to the proceeding. The Commission granted his request and adjourned the hearing until November 4. On that day Utilities Counsel for the Price Administrator conducted some further cross-examination of one witness for the Company, and called the Chief Accountant of the Commission as a witness, but offered no further evidence. Thereupon, on November 4, 1942, the hearing was closed.

Repeatedly, throughout the hearing the Commission, through its Chairman, stated its desire to receive testimony from the Office of Price Administration concerning the policies and program of the Federal government and the relation of such policies and program to the issues in the proceeding; for example, on September 8 before Utilities Counsel of the Office of Price Administration had completed his cross-examination of the first witness presented by
165 the Company, the Chairman of the Commission stated:

(Record 476) "This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding."

Similar examples appear on pages 477, 481, 490, 848, 850, 851, 853, and 1148. At the conclusion of the hearing Utilities Counsel stated that

"We think the record is clear now that the Commission's Order is inflationary in character." (Record 1144),

and again stated, referring to his summation,

"I will rest upon this statement." (Record 1148)

On November 9 the Commission issued its Order No. 2418, denying the petition of the Price Administrator of the Office

of Price Administration on behalf of the Director of Economic Stabilization, that Order No. 2401 be vacated.

On November 12 the Price Administrator filed with the Commission two petitions for reconsideration of the Commission's Order No. 2401, one on behlaf of the Director of Economic Stabilization and one on behalf of the Office of Price Administration. The petitions were denied by the Commission on November 16, by Orders Nos. 2422 and 2423, respectively.

On November 16, 1942, the expiration date of the 30 days' notice given by the Company to the Director of Economic Stabilization in accordance with the provisions of the Act of October 2, 1942, the Company put into effect the rate schedules prescribed by Order No. 2401, dated October 13, 1942.

Accordingly, the Company avers that Petitioner was accorded full intervention as contemplated by the Act of October 2, 1942, amending the Emergency Price Control Act of 1942, in the proceedings conducted by the Commission
166 in Formal Case No. 316; that at no time did the Commission unlawfully or improperly restrict the rights given the Petitioner by said Act of October 2, 1942 or by Executive Order No. 9250; that Petitioner had adequate and ample opportunity to present to the Commission the program of the Federal Government to control inflation and stabilize the cost of living; that the decision and order of the Commission of October 13, 1942 is legal and valid in all respects; that said decision and order were entered by the Commission after giving full consideration and effect to the program of the Federal Government, as presented to the Commission by Utilities Counsel of the Office of Price Administration, as fully set forth in the findings and opinion promulgated by the Commission at the time of entering said decision and order of October 13, 1942.

And having completely answered the averments set forth in said Petition of Appeal, the Company respectfully prays that said Petition be dismissed.

The Company moves the Court to dismiss this Appeal for the reasons (1) that Petitioner is not a proper appellant, and (2)that the appeal is without merit.

* * * * * * * * * * *

167 Endorsed: Filed Feb 1 1943 Charles E. Stewart, Clerk

Memorandum

This proceeding arises out of the entry of an order by the District of Columbia Public Utilities Commission on October 13, 1942 in which it granted the right of the Washington Gas Light Company, a public utility rendering gas service in the District of Columbia, to a rate increase applicable to the customers of that company.

An appeal is taken by the Office of Price Administration from that order and a like appeal is taken by the Director of Economic Stabilization from that order and a subsequent order entered on October 23, which denied the right of the Price Administrator on behalf of the Director of Economic Stabilization to intervene in that proceeding in accordance with the provisions of an act of Congress approved October 2, 1942.

168 On March 20, 1942 the Public Utilities Commission entered an order setting for hearing and investigation the rates of the Washington Gas Light Company. The order provided as follows: "That an engineering and accounting investigation be made relative to the rates, tolls, charges and tariffs and rules and regulations and conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding scale arrangement.

The sliding scale arrangement which was referred to by the Commission in its order of March 20, 1942, was entered into by the Commission on December 13, 1935. It appears that in 1935 the Commission was engaged in an investigation of the rates and valuation of the property of the Washington Gas Light Company. Following that investigation

the Commission, after hearing, entered into what is known as the sliding scale arrangement pursuant to the provisions of paragraph 18 of the Public Utilities Act of the District of Columbia.

That arrangement provided for a rate base of the property of the company; it provided for the determination of depreciation expense; it provided for a basic return of six and one-half per cent; it provided for a certain formula and certain principles for the annual determination of rates following the entry of this sliding scale arrangement. It provided also that if the net earnings of the company were to exceed six and one-half per cent, then the excess earnings should be divided between the customers and the company in the form of a rate reduction. It provided also that if the earnings of the company were lower than six and one-half per cent, under certain conditions there should be a rate increase to the company.

It was under the provisions of this sliding scale arrangement which the Commission entered its order of
169 March 20, 1942, providing for the fixing of rates of the Washington Gas Light Company for the year beginning September 1, 1942. Following the issuance of this order of March 20, certain investigations were made in accordance with the sliding scale arrangement by the Commission's accountants and engineers. On August 14, 1942, a pre-hearing conference was held, to which the Utilities Counsel for the Office of Price Administration was invited and appeared. Subsequently, the Commission went forward with the formal hearings on this matter, on August 18, at which time a petition for intervention in that proceeding was filed by the Office of Price Administration and was granted.

That petition sets forth the very grave responsibilities of the Office of Price Administration in connection with the stabilization of prices and for the elimination of price increases under public law No. 421, which was the first emergency price control act of 1942; it pointed out that pursuant

to the provisions of that statute, steps had been taken by the Office of Price Administration to stabilize nearly all commodity prices to the extent to which they were within the jurisdiction of the Office of Price Administration.

It also pointed out that payment for gas service constituted a regular item in the cost of living and that this was the first time since the nation had entered into the war and since we had been involved in this great emergency that the Commission was proceeding to fix rates pursuant to this formula which had been entered into in 1935 under economic conditions which were totally different from the conditions at the time the Commission began to consider the question as to what shall be the fair and reasonable rates of the Company.

The Commission was requested to reconsider the basic principle of the sliding scale arrangement in the light
170 of the Government's program to prevent increases in the cost of living and to stabilize prices.

The Price Administrator claims that notwithstanding he was permitted to intervene the Commission nullified the permission by refusing to reconsider the basic principles of the sliding scale arrangement in the light of the economic conditions and the Government's program to prevent inflation. Appellants contend that by its rulings and pronouncements it limited its consideration to such data as would enable it to apply the formula of the sliding scale arrangement in determining what rates were authorized by the sliding scale arrangement.

Appellants complain that the Commission narrowly considered the matter of rates within the limits of the sliding scale arrangement and refused to broaden the scope of its inquiry to determine whether the formula of the sliding scale could be properly applied in the light of known economic conditions and the Government's program to prevent increases in the cost of living . It is said for the Commission that the order of March 20, 1942 provided only for the engineering and accounting investigation necessary to con-

form with the sliding scale arrangement and that it was not required at the instance of appellants to broaden the scope of its inquiry beyond the purpose indicated in the order of March 20, 1942.

The amendment of October 2, 1942 to the Emergency Price Control Act of 1942 provided in part "That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

171 I think the Commission erred in its belief that it could proceed in accordance with the 1935 sliding scale arrangement alone and in the face of the Congressional Act of October 2, 1942.

The act of October 2, 1942 required that the Commission give the President's representative a reasonable opportunity to present his case that the Commission might determine whether the formula agreed upon in the sliding scale arrangement was inflationary, under present known conditions.

The record does not show that such opportunity was afforded: accordingly the case is returned to the Commission with direction that an inquiry be made to determine whether an application of the sliding scale formula is inflationary in view of the changed economic and war conditions.

True, some of the evidence offered by appellants to broaden the scope of inquiry was received. I think upon the record it is clear that the Commission regarded the inquiry within narrow limits and within the scope of the order of March 20, as interpreted by the Commission and that the Commission closed its ears to the insistant demand of appellants to give consideration to the new factors required by the act of October 2, 1942. In that respect I find that the the action of the Commission was arbitrary and illegal.

The right conferred upon the President and his representatives was not a mere formality. The privilege of intervention is one of substance and has direct relation to the avowed purpose of Congress to stabilize prices, wages and profits.

It is not so much a question as to whether the Commission should enlarge or broaden the scope of its hearing under the order of March 20 as what it should do to fix reasonable and just rates as required by the act of October 2, 1942 which seeks to prevent inflation. Such question may not be dismissed but must be met and the only way to meet it is to hear fully such evidence as the President's
172 representatives may produce and otherwise make a searching investigation in the light of present economic and war conditions to determine whether the proposed increase in rates will be inflationary in character and so contrary to the declared policy of Congress.

The sliding scale arrangement is not a contract, certainly not one which binds the public. It must give way to public policy and to Congressional enactment which expresses that policy. The Commission in good faith has sought to fulfill its obligations under the sliding scale arrangement but may have lost sight of the check upon it which has been voiced by Congress. I am not unmindful that the effort and the cost in bringing about the sliding scale arrangement was very great. I think it was the result of fair and honest judgment and has been found to be a good workable and economical plan, but it must now be subjected to a test not previously required.

In returning the case to the Commission it is with the direction that they afford the President's representatives the opportunity to fully test the inflationary trend, if any, which the proposed increase in rates may portend, and that the Commission cooperate therein. In so returning the case I indulge the hope that needless expense will be spared and that the question of the inflationary effect of the proposed increase will be fairly met. Any arrangement before Octo-

ber 2, 1942 lacks public approval and must give way to Congressional edict. The basic principles of the arrangement and other factors which inhere in the question of inflation and of fairness and justice are open for determination.

The appeal is sustained and the Commission's order will be vacated. This memorandum may serve as a statement of my reasons for such action. If additional reasons are considered to be necessary they may be suggested. Let appellants present an appropriate form for final order.

F. DICKINSON LETTS,
Justice

173 Endorsed: Filed Feb 10 1943 Charles E. Stewart, Clerk

Order

This cause coming on to be heard on the appeals of James F. Byrnes, Director of Economic Stabilization, and Prentiss M. Brown, Price Administrator of the Office of Price Administration, and oral arguments having been heard and briefs filed, and for the reasons set forth in a memorandum filed herein by the Court, the Court having determined that the appeal in this cause should be sustained and the Commission's order and decision #2401 should be vacated, it is hereby ordered, adjudged, and decreed:

That Order #2401 of October 13, 1942, by the District of Columbia Public Utilities Commission whereby the Washington Gas Light Company was authorized to increase rates or charges for gas service rendered in the District of Columbia be and it hereby is vacated.

Issued at the City of Washington, D. C., on the 10th day of February, 1943.

F. DICKINSON LETTS,
Justice.

180 Endorsed: Filed Mar 3 1943 Charles E. Stewart, Clerk.

Motion for Reargument and Reconsideration.

Comes now the Washington Gas Light Company, party appellee herein, by its counsel, and moves the Court that its order of February 10, 1943, be vacated, that its Memorandum of February 1, 1943, be rescinded, that the case be set for reargument and that the Court reconsider the issues involved; and further requests that the Court request the United States Court of Appeals for the District of Columbia for permission to consider and act upon the foregoing motion. As reasons for its motion and request, the Company states as follows:

Upon the filing of their petition of appeal by the parties appellant herein, the Public Utilities Commission of the District of Columbia, pursuant to the statute, certified to this Court the record in the proceeding before it, including a transcript of the testimony, the originals of all ex-
181 hibits and copies of all pleadings and orders. On December 8, 1942, this record, bound in a package, was filed with the Clerk of this Court and, in due course was transmitted to the File Room of the Clerk's Office, where an erroneous case number was inadvertently put upon the package and the package was put on a shelf under the erroneous number. The learned Justice who heard and decided the case was not made aware of the existence of the record before the Commission, did not see that record or consider it during his consideration of the case prior to the promulgation of his memorandum of decision on February 1, 1943, or prior to the entry of the order of February 10, 1943, or until February 16, 1943.

183 Endorsed: Filed Mar 3 1943 Charles E. Stewart, Clerk

Affidavit

DISTRICT OF COLUMBIA) *ss:*

E. Barrett Prettyman, being duly sworn, deposes and says that he is attorney of record for Appellee in the cases of Byrnes, et al., vs. Flanagan, et al., Nos. 17805 and 17806; that on February 17, 1943, he at the request of the Judge of this Court who had heard and decided the case, appeared with other counsel for the several parties before the Judge and he informed them that his attention had been called to the fact that the record in said proceedings, as certified to the Court from the Public Utilities Commission of the District of Columbia, had been misfiled and had not been previously before him, and he now had on his desk a bundle of papers which purported to be the lost record; that he thereupon opened said papers to determine whether they were the lost record and found that they were; that the Judge stated that this record (being the record certified to the Court by the Public Utilities Commission) had not been before him prior to this date, i.e., February 17, 1943.

E. BARRETT PRETTYMAN.

Subscribed and sworn to before me this 3rd day of March, 1943.

FLORA A. MYERS,

(Seal) *Notary Public.*

184 Endorsed: Filed Mar 3 1943 Charles E. Stewart, Clerk.

DISTRICT OF COLUMBIA) *ss:*

Raymond Sparks, being duly sworn, deposes and says that he is a member of the bar of the District Court of the United States for the District of Columbia and a member of the firm of Hewes, Prettyman and Awalt, engaged in the general practice of law in the District of Columbia and attorneys for the Washington Gas Light Company, party appellee in Byrnes, et al, vs. Flanagan, et al, Nos. 17805 and 17806; that after the entry by the District Court of its

order in that proceeding on February 10, 1943, and after the perfecting of the appeal from that order on February 12, 1943, he began the several steps necessary to be taken by counsel for the transmission of the record to the Court of Appeals; that neither he nor the Clerk of the Court could find the record of the proceeding before the Commission; that upon inquiry he learned that this record had been duly prepared by the Chief Clerk to the Public Utilities Commission, certified by the Commission, transmitted to the Clerk of this Court and directed to be placed in the File Room of the Clerk's Office.

That with his partner, E. Barrett Prettyman, he called upon the Judge of this Court who had heard and decided the case, to seek his assistance in locating the missing record; that they were informed by the Judge that he had never seen the record, either at the time of trial or thereafter, and that he was not aware of the existence of any such record.

That thereafter a search was made, with the assistance of the attendants in the File Room of the Office of the Clerk of the Court, and the record which had been certified by the Public Utilities Commission was found in a package upon which an erroneous case number had been placed, that is, the number "13108" was on the package instead of
185 "17805" or "17806"; that he was informed by these attendants that the package had not left their custody since being filed, and that it would not have been sent to the Court upon request for the file in the name or number of this proceeding.

That thereafter counsel for all parties appeared before the Judge who had heard and decided the case, and he was informed of the circumstances.

RAYMOND SPARKS.

Subscribed and sworn to before me this 1st day of March, 1943.

FLORA A. MYERS,
(Seal) *Notary Public*, D. C.

186 Endorsed: Filed Mar 8 1943 Charles E. Stewart, Clerk.

Answer to Motion for Reargument and Reconsideration

In opposition to the Motion for Reargument and Reconsideration of the order of the Court of February 10, 1943, filed by the appellee Washington Gas Light Company, the appellants, James F. Byrnes and Prentiss M. Brown, respectfully submit that:

1. All relevant portions of the record before the Commission were in fact before the Judge of the Court who decided the case and were in the pleadings, in the argument and in the briefs filed with the Judge of the Court, all of which is more fully set forth in the affidavit of Harry R. Booth, filed herewith.

2. The issues decided by the Court in these proceedings were essentially legal issues; i.e., whether the Commission gave due and proper consideration to the Act of October 2, 1942, amending the Emergency Price Control Act of
187 1942, and the rights and privileges of the appellants thereunder, in entering its order of October 13, 1942, and deciding the matter primarily according to provisions of the sliding-scale arrangement.

3. Counsel for the Washington Gas Light Company and the Commission, appellees, conceded and insisted that the Commission was compelled to decide the matter before it according to the provisions of the sliding-scale arrangement.

4. The testimony before the Commission was irrelevant to the issues in these proceedings and consideration and examination thereof was unnecessary to the determination of such issues, since the primary question before the Court concerned the actions of the Commission as reflected in its orders, motions, and rulings, all of which were related in the pleadings which were before the Court and which were discussed in argument.

5. A request for reconsideration has been previously presented to the Judge of the Court who heard and decided

these cases. Memoranda have been filed with said Judge by appellants and appellees, and the said Judge has apparently determined that every essential and important fact bearing upon the Commission's conduct of its proceeding and its ultimate orders was before the Court and was considered by the Court in the deliberations which culminated in the order of February 10, 1943.

6. A full and fair hearing was accorded appellees by the Court.

Wherefore, appellants pray that the motion of appellees be denied.

Respectfully submitted,

JAMES F. BYRNES,
Director of Economic Stabilization.

By PRENTISS M. BROWN,
Price Administrator of the Office of Price Administration.

DAVID GINSBURG,
General Counsel—F. O. B. #1

HARRY R. BOOTH,
Utilities Counsel—F. O. B. #1
Legal Division,
Office of Price Administration.

188 *Affidavit*

DISTRICT OF COLUMBIA) *ss:*

Harry R. Booth, being duly sworn, deposes and says that he is an attorney of record for appellants in the cases of Byrnes, et al., v. Flanagan, et al., Nos. 17805 and 17806; that he has examined the motion for reargument and reconsideration, and the affidavits of affiants E. Barrett Prettyman and Raymond Sparks; and in answer thereto further deposes and says:

1. That, at the time of rendering his opinion in these causes, the Court had before it all relevant portions of the record before the Commission, and that the testimony was reviewed by counsel for appellants and appellees in oral argument and in briefs.

2. That the Judge of the Court who heard and decided the cases before him the following documents, in addition to the detailed answers filed by appellees:

(a) The petition of appeal in the Byrnes case, No. 17805, and the following documents, which were attached to and made a part thereof:

I. The Public Utilities Commission's order of October 13, 1942 (Exhibit A) including the dissenting opinion of Commissioner Hankin;

II. The petition of appellant, dated October 19, 1942, praying that the order of October 13, 1942, be vacated, (Exhibit B);

III. The order of the Commission of October 23, 1942, denying such petition (Exhibit C), including Commissioner Hankin's dissenting opinion;

IV. The petition of appellant, dated October 31, 1942, praying for the amendment of the Commission's Order of October 23, 1942 (Exhibit D);

V. The Commission's order of November 9, 1942, denying the petition of October 31, 1942 (Exhibit E), including Commissioner Hankin's dissenting opinion;

189 VI. The petition for reconsideration filed by appellant on November 12, 1942 (Exhibit F);

VII. The order of the Commission dated November 16, 1942, denying the petition for reconsideration (Exhibit G).

(b) The petition for appeal in the Henderson Case, No. 17806, and the following documents which were attached to and made a part thereof:

I. The Commission's order of October 13, 1942, (Exhibit A), including the dissenting opinion of Commissioner Hankin;

II. The intervening petition of appellant, dated August 18, 1942 (Exhibit B);

III. The petition of appellant for reopening of the proceeding, dated September 28, 1942 (Exhibit C). (This was denied by the Commission on September 30, 1942).

IV. The petition for reconsideration filed by appellant on November 12, 1942 (Exhibit D);

V. The order of the Commission, dated November 16, 1942, denying the petition for reconsideration (Exhibit E).

(c) The answers to the appeals filed by the Washington Gas Light Company which not only set forth in considerable detail the facts relied upon by them to justify the Commission's order of October 13, 1942, in the light of the Government's price program and the Act of October 2, 1942, but also contained the following documents:

I. The Commission's order of October 13, 1942.

(d) The answer filed by the Commission to the Henderson appeal, No. 17806, which not only set forth in considerable detail the facts of the case relied upon by it to justify the Commission's order of October 13, 1942, in the light of the Government's price program and the Act of October 2, 1942, but also contained the following documents:

I. The Commission's order of March 19, 1935, in the so-called Washington Gas Light valuation case (Exhibit A);

II. The Commission's valuation order in the Georgetown Gas Light Company case, dated March 19, 1935 (Exhibit B);

III. The Commission's order of December 13, 1935, approving the sliding-scale arrangement (Exhibit C);

IV. The Commission's order of March 20, 1942, initiating this proceeding (Exhibit D);

V. The Commission's order of July 21, 1942, giving notice of hearing of this proceeding (Exhibit E).

190 3. That the appeals were argued before the said Judge of this Court for two days, to wit on December 22 and 23, 1942, and that counsel for appellants and appellees were given every opportunity to and did present and summarize the essential points of the record before the Commission necessary to a determination of the appeals. That during such arguments counsel for appellees conceded that the Commission was compelled to decide the case ac-

cording to the basic provisions of the sliding scale arrangement. That at page 132, 134 and 135 of the transcript of said argument, Corporation Counsel Keech speaking asserted:

(Page 132) "A consideration of that order would be totally inadequate unless this Court had before it, as our answer does place before you, the history leading up to the sliding scale arrangement . . . Turning again to the present order, of course the Commission can modify the sliding scale arrangement, under the determination of this Court, provided it gives timely notice (134) . . . With that state of the record it would therefore seem that the Commission was, of necessity, bound, if any change were to be made, to give timely notice. And, furthermore, to give, and have before it before making the change, facts upon which such a change could be made." (136)

And at page 151-152 Mr. Keech said:

"What they wanted to have was a hearing in which all factors could be determined. Of course, that embraced valuation, rates, depreciation, and everything else. That was not within the scope of the hearing. It was not intended by the Act."

And counsel for the company, Mr. Stevens, asserted at page 247:

"I wish to address myself for a very few minutes to the proposition that were the Court to set aside this order of the Commission it would level a deadly and staggering blow at the administration of public utility rates in the District of Columbia under the sliding scale arrangement which is authorized by paragraph 18 of the Public Utilities Act."

4. That subsequently counsel for appellees and appellants filed briefs with the Court.

5. That, after the said Judge of the Court discovered that he did not have the record before him as certified by
191 the Commission, counsel for the appellee, Washing-

ton Gas Light Company prepared and submitted a further brief to the Court pointing out such parts of the testimony upon which they relied for the purpose of having said Court vacate its decree of February 10, 1943.

HARRY R. BOOTH.

Subscribed and sworn to before me this 8th day of March, 1943.

My comm. exp. 11-15-47.

MARIETTA L. ENGOR,
(Seal) *Notary Public.*

* * * * * * * * * * *

192 Endorsed: Filed Mar 12 1943 Charles E. Stewart, Clerk.

Memorandum

It is with some chagrin that I admit the certified record of the proceedings of the Public Utilities Commission was not physically brought to my attention upon the appeal. Let me say I gave it no importance for I realized that all contending parties were in possession of copies thereof and quoted extensively therefrom in their oral arguments and written briefs. It did not occur to me that either the Commission or the Utility had failed in any way to present fully their views upon the appeal. I did learn when the record for appeal was being prepared that the certified record had not been formally brought to my attention. In some way which remains unexplained the record certified by
193 Commission had been placed in the file room of the clerk commingled with some of the papers in a patent case and wrapped in a bundle carrying the number of the patent case. When this came to my attention through one of the attorneys for the Utility I had the record sent to my chambers and summoned all counsel concerned in the appeal and explained to them what had happened. It was suggested and I believed that I should examine the record and determine whether upon its consideration I should wish to

adhere to my findings and judgment or might find it in the interest of justice to alter, amend or set aside the judgment which had been entered. In that informal conference it was uniformally agreed that it would be appropriate for me to read and consider the certified record of the Commission and determine what I should do in the discharge of my judicial duty with respect to the findings and the judgment which had been entered. Thereafter and promptly counsel for the Utility and for the appellants furnished me with memoranda suggesting such parts of the record as were regarded as important to a decision of the issues of the case.

At about this juncture counsel for the Commission suggested that in view of the appeal which had been noted, I had lost control of my judgment record and that anything which I might wish to do about it would be futile and of no lawful effect. Counsel for the Utility was inclined to agree with this contention. Nevertheless I thought I should know whether the certified record supported or in any way contradicted or disproved any of the essential elements of the case as shown in the pleadings, the oral arguments and written briefs of counsel. Having so determined upon my course I read with care and precision the certified record of the Commission. It took me three days, including a Saturday, a Sunday and Washington's birthday to do it. I did not limit my reading to parts pointed out by
194 counsel, but perused the entire record with its exhibits.

When I had so read the certified record I was fully convinced that counsel for the contending parties had fully and faithfully presented to me in their oral arguments and briefs all facts and matters pertinent to this appeal which appear upon such certified record. The court was in no wise misled nor confused as to what had occurred in the hearing before the Commission. As to the essential facts there was no disagreement. The issue was one of law relating to admitted facts.

The certified record fully supports my findings of fact and I continue to believe such findings justify my conclusions of law and definitely require the judgment which was entered.

I conclude that it was not a matter of inadvertence on the part of any contending party that the certified record of the Commission was not formally and physically presented at the trial. Although the oral argument consumed two trial days no one present and of counsel considered it necessary or important to show the proceedings before the Commission except in the manner which resulted from the deliberate choice of counsel. They were fully justified in this, since the certified record adds nothing to the presentation made by counsel at the trial.

The motion for reargument and reconsideration is regarded as informal and yet for the purpose of the record it will be appropriate that appellants present a suitable order overruling same.

F. DICKINSON LETTS
Justice.

195 Endorsed: Filed Mar 16 1943 Charles E. Stewart, Clerk.

Order

This cause coming on to be heard on the appeals of James F. Byrnes, Director of Economic Stabilization, and Prentiss M. Brown, Administrator of the Office of Price Administration, from an order entered on October 13, 1942, by the Public Utilities Commission of the District of Columbia authorizing an increase in rates for gas supplied by the Washington Gas Light Company, this Court on February 1, 1943, having entered a memorandum setting forth its reasons why the appeal should be sustained and on February 10, 1943, having entered an order sustaining said appeal and vacating said order of October 13, 1942, of the District of Columbia Public Utilities Commission, and on the 12th day of February, 1943, having stayed said judgment pending appeal to the United States Court of Appeals

for the District of Columbia, a notice of appeal to
196 said Court of Appeals having been filed by the Company and the Commission, and a motion having been made herein on behalf of the Company addressed to this Court asking that the case be set for reargument and that the Court reconsider the issues involved and further asking this Court to request the United States Court of Appeals for the District of Columbia for permission to consider and act upon said motion, and the Court having considered said motion of appellee for reconsideration and reargument, and on March 12, 1943, having entered a memorandum setting forth his reasons why said motion should be denied, the Court hereby finds:

1. That all essential parts of the record before the Commission were contained in the pleadings, answers, orders, argument, and briefs submitted to the Court prior to his memorandum dated February 1, 1943, and decree dated February 10, 1943:

2. That a review of the transcript of the testimony before the Commission demonstrates that there were no matters of consequence bearing on the issues in this case not previously called to the attention of the Court;

3. That the appellee, Washington Gas Light Company, has failed to demonstrate any good or sufficient cause for the granting of its motion;

4. That a full and fair hearing has been granted to all parties before this Court.

Now, therefore, it is hereby ordered that the motion for reargument and reconsideration on behalf of the company be and the same hereby is denied.

F. DICKINSON LETTS
Justice

203 Public Utilities Commission of the
District of Columbia

Order No. 2219.

March 20, 1942.

In the Matter of Investigation of rates, tolls, charges, tariffs, rules, regulations and conditions of service of the WASHINGTON GAS LIGHT COMPANY. P. U. C. No. 3305, Formal Case No. 316.

By the Commission: A sliding scale arrangement for fixing rates of the Washington Gas Light Company was established by Order No. 1458 of the Commission (Findings Nos. 1 and 2). Under the arrangement rates are to be adjusted as of September 1st of each year.

It Is Ordered:

Section 1. That an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding scale arrangement.

Section 2. Notice is hereby given of the intention of the Commission to hold a public hearing on the subject matter of the investigations.

A True Copy: By the Commission:

E. J. MILLIGAN
Executive Secretary.

N. H. HETZEL
Chief Clerk.
GC

205 Public Utilities Commission of the
District of Columbia
Washington

July 21, 1942

In the Matter of Investigation of rates, tolls, charges tariffs, rules, regulations and conditions of service of the WASHINGTON GAS LIGHT COMPANY. P. U. C. No. 3305, Formal Case No. 316.

Notice of Hearing

Notice is hereby given that the Public Utilities Commission of the District of Columbia will hold a formal public hearing on Tuesday, August 18, 1942, at 10:00 a. m., in Room 500, District Building, relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458.

A True Copy: By direction of the Commission:

E. J. MILLIGAN,
Executive Secretary.

N. H. HETZEL
Chief Clerk.

207 *Petition For Leave To Intervene*

May It Please The Commission:

Leon Henderson, Price Administrator for the Office of Price Administration, respectfully petitions for leave to intervene, and in support thereof, makes the following representations:

1. Petitioner is Price Administrator of the United States, and Administrative Officer of the Federal Government, with offices in Washington, D. C. This office was created by the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong.,) for the purpose, among others, of:

(a) Stabilizing prices and preventing speculative unwarranted and abnormal increases in prices,

(b) Eliminating and preventing profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities caused by or contributing to the national emergency.

(c) Assuring that defense appropriations are not dissipated by excessive prices.

(d) Protecting persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent upon life insurance, annuities and pensions, from undue impairment of their standard of living; and

(e) Preventing a post-emergency collapse of values.

(Section 1(a) of the Emergency Price Control Act of 1942)

2. The program of the Office of Price Administration to stabilize commodity prices and costs of living is essential to the success of the war effort.

3. In accordance with the purposes of the Emergency Price Control Act, the Office of Price Administration has undertaken to stabilize commodity prices and the cost of living throughout the country by a series of Maxi-
208 mum Price Regulations. Indeed, general price increases have appeared to be such a grave threat to the efficient production of war materials and to the stability of the national income, that the Office of Price Administration, within the limits of statuory authorization has established maximum selling prices for all commodities and services. The immediate purpose of such regulation is to guarantee to the American people that every living cost will remain stable, and that the cycle of increasing prices, increasing wages, leading to disastrous inflation, may be averted. That is a prerequisite to the further measures which are necessary to insure war-time stability in the economy. Stable living cost means stability in the real wages of the worker. Increases in the cost of living bring about the need for a constant revision of wage contracts, constant bargaining and negotiations, and the certain pro-

spect of interrupted production; normal collective bargaining processes are strained, perhaps broken, and war production is threatened with being shackled, disrupted, or even paralyzed.

4. Washington Gas Light Company (hereinafter sometimes referred to as the Company) is a public utility engaged in the business of supplying gas service to domestic, commercial, and industrial consumers in the District of Columbia at rates and charges which are subject to the jurisdiction of the Public Utilities Commission of the District of Columbia (hereinafter sometimes referred to as the Commission.

5. It appears that payments for gas service represent a regular item in the cost of living of a vast majority of residents in the District of Columbia.

6. By its order of December 13, 1935, the Commission established a sliding-scale arrangement for determining the rates and charges which the Company shall be allowed to demand and collect for supplying such gas service

7. Pursuant to the provisions of said sliding-scale arrangement the Commission has entered upon an investigation for the purpose of determining, among other things, the amount to be applied for the decrease or increase of rates during the "Rate Year" commencing September 1, 1942, and has directed that a hearing be held thereon commencing August 18, 1942.

8. Washington Gas Light Company contends that its net earnings during the fiscal year (Test Year) ended June 30, 1942, were approximately $464,000 less than it was entitled to earn under the provisions of said sliding-scale arrangement. It, therefore, seeks to have an increase of
209 approximately $387,122 applied during the "Rate Year" commencing September 1, 1942, and requests that its schedule of rates be adjusted accordingly.

9. It is contended by the Company that according to the provisions of said sliding-scale arrangement of December 13, 1935, the Company is entitled to such increase in rates and charges to compensate it for the difference between the

actual return earned during the last fiscal (Test) year and the return which it was permitted to earn under the arrangement.

10. It appears that the claimed deficit in earnings during the past fiscal year is predicated in large part upon alleged estimated increases in federal income taxes levied or to be levied upon income received in the period from July 1, 1941, to June 30, 1942, over the preceding year.

11. The approval of an increase in utility rates because of increased federal income taxes would be contrary to the intention of the Congress, inflationary in character and adversely affect the program and policies of the Office of Price Administration to stabilize prices.

12. It appears that this is the first time since the United States entered the war that the Commission is called upon to make a determintaion or to fix rates under said sliding-scale arrangement. The application of the arrangement should be reconsidered in the light of the Government's program to prevent inflation and to stabilize the cost of living.

13. The question of under what circumstances rates and charges for gas service, should be increased during this period of national emergency resulting from the war, is one of basic national importance, in which the Office of Price Administration has a substantial interest.

NOW, THEREFORE, your petitioner prays that the Commission enter an order granting him leave to intervene and become a party to this proceeding.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration

By: DAVID GINSBURG
General Counsel

HARRY R. BOOTH
Utilities Counsel

214 *Petition for Reopening of Proceeding*

On August 18, 1942, the Commission granted the Price Administrator of the Office of Price Administration (sometimes hereinafter referred to as Petitioner) leave to intervene and become a party to this proceeding.

On September 14, 1942, counsel for the Price Administrator of the Office of Price Administration, in consideration of the several statements of the Commission as to the scope of the matters at issue in this proceeding, orally moved the Commission to issue appropriate orders under which the Commission could, in this proceeding, reconsider the provisions of the "sliding-scale arrangement" in the light of present economic conditions, and could consider all proper factors necessary for a determination of just and reasonable rates and charges for service rendered by public utilities (Tr. 788—796).

Such motions were taken under advisement by the Commission (Tr. 796). However, the hearings were concluded on September 14, 1942, and the Commission has not made any ruling upon said motions.

215 Wherefore, your Petitioner renews said motions and respectfully requests that the Commission issue appropriate orders to:

Reopen this proceeding and direct that further evidence be taken with respect to:

1. The effect of present changed economic conditions upon the provisions of the "sliding-scale arrangement" made in 1935.

2. The necessity for revision of the provisions of the "sliding-scale arrangement" because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction.

3. The relationship and effect of the Federal Government's program to control inflation and stabilize the cost of living to the "sliding-scale arrangement" and the proceeding.

4. The questions raised by its vice-chairman as to the proper method of allocating expenses to the Company's customers and the proper amounts which should be charged against the operating costs of the Company for rate making purposes

5. All other factors which are necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

* * * * * * * * * *

219 Public Utilities Commission of the District of Columbia

In the Matter of Rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the WASHINGTON GAS LIGHT COMPANY.

Findings and Opinion Formal Case No. 316

Nature of Proceeding

This is a proceeding involving the usual annual determination of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company pursuant to the provisions of the sliding scale arrangement established by Order No. 1458, dated December 13, 1935.

The sliding scale arrangement provides that prior to the beginning of each rate year (defined as the twelve months' period from September 1 to August 31, inclusive) this Commission shall determine after public notice and opportunity for hearing:

(1) An amount to be applied for the decrease or increase of rates to be effective during the said rate year, and

(2) A schedule of rates, rules, and regulations accomplishing such decrease or increase.

On March 20, 1942, (Order No. 2219), the Commission ordered that an investigation be made, and on July 21, 1942, the Commission set the matter for hearing. Hearings were held on August 18 and 19, 1942, and on September 4, 11, 14, and 30, 1942.

The rates in effect during the last test year (the twelve months' period ended June 30, 1942) were those established by Order No. 1921, effective as of September 1, 1940. These rates were based upon the operating experience of the Company for the test year July 1, 1939, to June 30, 1940.

During the present proceeding, we indicated that our responsibilities are twofold. In the first place, it is the duty of this Commission to determine, in accordance with the provisions of the sliding scale arrangement as such arrangement is now constituted, whether the Washington Gas Light Company is entitled to an increase in rates for the year commencing September 1, 1942, and the
220 amount of such warranted increase. This responsibility is so clearcut that to ignore it would constitute an evasion of our duty and would be a serious reflection upon the ability of this Commission to cope with its problems in a fair and impartial manner.

Secondly, having made this determination, it is our duty to give recognition to existing conditions and the bearing of such conditions upon the question before us. In addition to the present economic situation, which admittedly is of vital importance, we must also consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia.

At the commencement of hearings in this proceeding, August 18, 1942, the Office of Price Administration, through H. R. Booth, its Utilities Counsel, filed with this Commission its petition for leave to intervene. This petition was granted, and Counsel for the Office of Price Administration attended all the hearings and submitted briefs.

Exhibits were presented by the Commission's Chief Accountant and Chief Engineer reflecting the results of their investigations, which extended over a period of several months. The Chief Engineer's testimony related to the allocation of the rate base to service outside the District of Columbia. The Chief Accountant testified that computations in accordance with the sliding scale arrangement in-

dicated that the Company was entitled to a rate increase of $324,718.06. The Company's computation indicated a rate increase of $381,597. The difference between the two amounts is occasioned entirely by certain adjustments to operating expenses and taxes and those required under Section 6 of the sliding scale arrangement made by the Commission's witness but protested by the Company.

Careful study has been given to all factors having a bearing upon these problems in arriving at the decisions hereinafter set forth.

Staff Adjustments

Payment to the Greater National Capital Committee

The question involved is whether or not the payment made by the Company is in the nature of a contribution or a sales promotion expense. The Greater National Capital Committee is an arm of the Washington Board of Trade, and its chief function is to attract visitors to the Nation's Capital. The principal means employed is that of
22 inducing the holding of conventions in Washington.

In Formal Cases 292 and 304 the Commission held that the benefits derived by the Washington Gas Light Company from this expenditure were of such a conjectural nature that it must be viewed as a donation to a worthy civic organization rather than a sales promotion expense as the latter term is ordinarily defined. We, likewise, hold this view and find further that in view of the present overcrowded condition of the city due to the war effort there is even less justification for such an expense. The amount in controversy, $88.85, stated by the Company as being a token payment for purposes of Commission ruling, should therefore be disallowed as an operating expense for rate-making purposes.

Sales Promotion Expense

This issue arises by reason of the Commission's requirement that the Merchandising and Jobbing activities of the Company be segregated from its principal business of fur-

nishing gas service and relates to the allocation of certain expenses applicable to both the sale of gas and the sale of appliances, namely the salaries paid retail salesmen and the cost of advertising appliances.

The Sales Promotion Department of the Company is composed of several divisions, and the salaries of the retail salesmen constitute only about 25% of the total salesmen's salaries. The remaining 75% covers wholesale and promotional salesmen who ordinarily are not engaged in the sale of appliances and therefore receive little or no commission. The retail salesmen are paid comparatively small salaries plus commissions on appliance sales. The commissions are paid not only on appliances sold by the Gas Company, but upon appliances sold by other dealers when such sales result from the efforts of the Gas Company's salesmen. In accounting for the salaries and commissions paid the retail salesmen, their entire salaries and the commissions paid on appliance sales by other dealers are charged to Sales Promotion Expenses, while commissions paid on appliances sold directly by the Gas Company are charged to Merchandising and Jobbing Expense. The Company contends that this practice is proper for the reason that it represents an allocation based upon the time of the retail salesman devoted to extolling the virtues of gas as a fuel and the actual sale of appliances. The Company cites the fact that on the average the salesmen close only one sale out of fifteen calls. The Commission's witness contends that the salaries paid these salesmen represent additional compensation for the selling of appliances, and such salaries should be accounted for in the same manner as the commissions—that is, upon the ratio of commissions paid on appliances sold by the Company to the total commissions paid.

222 The compensation of the retail salesmen depends in major part on the sale of appliances, and it is therefore obvious that his major efforts are devoted to the selling of appliances. It follows that the compensation paid these salesmen, whether it be in the form of commissions or salaries, is assignable to Sales Promotion Expense.

and Merchandising and Jobbing on the basis of results produced, and since this is the method used by the Commission's witness, we think the adjustment is proper.

On the second item, of appliance advertising, the Company contends that 80% of such advertising is a proper promotional expense, whereas the Commission's witness has recommended that only 50% of such expense be allowed. The only support for the 80% allocation advanced by the Company was the judgment of their Sales Manager, and the ratio of appliance sales by the Company to sales made by other dealers. The allocation made by the Commission's witness is based upon the practice of the Company of paying, under certain conditions, 50% of the cost of advertising gas appliances by other dealers. In view of the Commission's requirements that the appliance business of the Company be segregated entirely from its gas business, the Merchandising and Jobbing activities of the Company must be viewed in the light of the relations of the Company with any other appliance dealer. The appliance or general advertising of the Company for the test year under consideration constituted only about 11% of the total advertising, the remainder being characterized as institutional advertising. The adjustment proposed by the Commission's witness relates only to the former. The fact that the Company segregates appliance advertising from its other or institutional advertising might of itself be sufficient grounds for saying that all of such advertising relates entirely to the Merchandising Activities of the Company. However, in view of the practice of participating in advertising campaigns of other dealers we will go no further than the adjustment made by the Commission's witness.

We hold that the aggregate adjustment of $26,824.75 applicable to the items discussed above is proper.

Expense of Financing

The Commission's witness excluded from operating expense certain costs incident to increasing the authorized capital stock of the Company, on the grounds that they per-

tain only to the securing of new capital and as such are properly chargeable to capital stock expense when and if the stock is issued. The Company contends that
223 these expenditures should be permitted in operating expenses for the reason that, through no fault of the Company, the Commission was not organized and able to give the approval necessary when the stock in question ($4.25 preferred) could have been sold advantageously. We sympathize with the Company's position, but in view of the requirements of the classification of accounts and the nature of the items in question, and due further to the fact that the consumers likewise were not at fault, we cannot depart from proper accounting and therefore hold that the adjustments made by the Commission's witness, aggregating $3,256.67, are proper.

Payment to U. S. O.

The Commission's witness excluded from operating expense a payment of $1,250.00 to the U. S. O. on the grounds that such payment was a donation not necessary in the furnishing of gas service and as such properly includible in Account 538—Miscellaneous Income Deductions. The Company contends that this is not an ordinary donation, inasmuch as the U. S. O. is a war project backed by the Federal Government and that the morale and behavior of the armed forces are of vital concern to the Company and to all citizens. We agree, of course, that the U. S. O. is a necessary organization in the conduct of the war effort, but we cannot agree that the donation made by the Company is different from other donations to worthy causes. The customers of the Company are called upon for direct donations to this organization, and they should not be called upon for a further donation in the form of increased rates for gas service. We, therefore, approve the adjustment as made by the staff.

Excess Profits Tax

The Commission's witness eliminated the excess profits tax paid for the year 1941 after adjustment for the effect

of such elimination on normal taxes because of the possible future adverse effect upon consumers with little material benefit to the Company. The Company contends that it would not have been liable for excess profits tax if the Commission had been in a position to act expeditiously on its application for authority to issue $4.25 perferred stock in 1941 and that the Company had no "excess" profits in the popular sense of the word. We recognize the equity of this contention. However, we cannot overlook the fact that the recognition of excess profits tax as a proper element in the determination of rates for service under the rates of taxation presently proposed in the pending Revenue Act for 1942 would result in a continuing cycle of rate increases severely penalizing the consumer without materially
224 benefiting the Company. We are of the opinion that as a general proposition, excess profits taxes under existing conditions should not be considered in the determination of rates. Therefore, the adjustment of $43,928.02 to eliminate this item is approved.

Section 6 Adjustment

This item relates to the adjustment under Section 6[1] of Order No. 1458 on account of the increase in the price of fuel. In making this adjustment the Company has used the inventory cost of fuel as of June 30, whereas the Commission's witness has used such cost as of May 31. The Commission's witness contends that since the operating expenses of the Company were not affected by the average cost of fuel as of June 30, 1942, the use of such cost would be contrary to the provisions of Section 6. The Company contends that the unit cost of fuel as of June 30 should be used, on the theory that the purpose of Section 6 is to pro-

[1] If, at any Adjustment Date, it appears that the operating expenses of the Companies for the Test Year were increased or decreased by reason of change in the rates for production labor, the unit price of natural gas, the delivered unit price of other fuels, or taxes, and the aggregate amount attributable to such change during the Test Year for any or each of the above enumerated items exceeds 5 per centum of the aggregate amount of any such item for the Test Year, then there shall be an adjustment in the Amount Available for Return equal to the effect of such change in unit costs for the entire year.

vide for known increased costs. It is clear that the intent of Section 6 is to allow certain adjustments for increased costs, but it is equally clear that there is a definite limitation on the method of determining the amount of the adjustment. If we were to apply the purpose of Section 6 indiscriminately there is no doubt that other adjustments would be necessary, some upward and some downward. We think that a departure from the specific provisions of Section 6 would not be warranted, and even though it is recognized that the purpose of Section 6 is to provide for increased costs, we hold that the adjustment made by the Commission's witness is in accord with the specific provisions of Section 6 and that the disputed difference of $3,294.63 should not be considered in the determination of amount available for increase of rates.

Operating Expenses

In addition to the adjustments made by the witness for the Commission, Commissioner Hankin raised several questions relating to the propriety of certain operating expenses.[2] On these questions we have the following opinion and conclusion.

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Order No. 1458, which established the sliding scale arrangement, provides that the Commission shall determine the net amount available for return for each test year by deducting from the gross operating revenue of the Company the adjusted operating expenses for the test year, the accruals for retirement reserve, reasonable accruals for uncollectible bills, and reasonable accrual for taxes.

The order further provides that the operating expenses of the Company shall be adjusted for any accounting departures[3] during the test year; for over or under accruals in taxes, uncollectible bills, and such other accrued accounts

[2] Three items aggregating $60 were conceded by the Company because of the insignificance of the amount, and adjustment has been made therefor.

[3] "Accounting departure" means a departure, not resulting solely from the exercise of judgment, from the correct application of the accounting classification and interpretations prescribed by the Commission, not in conflict with the sliding scale arrangement, prevailing at the date of such entry.

for which adjustment is provided by the prevailing accounting classification; and to exclude those expenses allocated to gas service outside of the District of Columbia.

Thus the sliding scale arrangement does not attempt to define operating expenses or to indicate that certain types of operating expenses should be excluded in determining the net amount available for return, beyond the adjustments described above. The sliding scale arrangement, however, does clearly indicate that operating expenses should be determined in accordance with the prevailing accounting classification.

On January 11, 1940 (Order No. 1846), this Commission prescribed for use by the Washington Gas Light Company the Federal Power Commission Uniform System of Accounts prescribed for Natural Gas Companies subject to the Provisions of The Natural Gas Act, with certain modifications to permit the continuance of the sliding scale arrangement. This system of accounts states the purpose of the operating expense accounts to be as follows:

226 "The operating expense accounts (701 to 809) are designed to show in detail the cost (except depreciation, amortization and depletion, certain property losses, and taxes) of furnishing gas utility service."

It follows, therefore, that if the operating expenses of the Company are recorded in accordance with the prevailing Uniform System of Accounts the function of the Commission is to determine whether or not the expenses so recorded are reasonable. Obviously, the Commission itself cannot, collectively or individually, review the books of the Company to make a determination as to the reasonableness of every item and must depend upon its staff to call attention to those that appear questionable. This the staff has done, and we have herein expressed our opinion relative to such items. We find that the operating expenses of the Company for the test year ended June 30, 1942, excepting the adjustments heretofore discussed, have been recorded in accordance with the Uniform System of Accounts prescribed by this Commission and that such expenses are fair

and reasonable and properly considered in the determination of rates under the sliding scale arrangement.

Federal Income and Excess Profits Taxes

The computations of the net amount available for rate increase presented by both the Company and the Commission's witness included accruals for Federal income taxes at the rate of 40% for the last six months of the test year under consideration (January 1, 1942, to June 30, 1942), in accordance with that provision of the sliding scale arrangement which provides for a reasonable accrual of taxes. For the first six months of such test year (July 1, 1941, to December 31, 1941), this same rate was applied in accordance with the provisions of Section 6 of the sliding scale arrangement.

However, present-day conditions compel us to consider whether accruals for Federal income taxes, at rates considerably higher than rates in effect in previous years, should be allowed in their entirety for rate-making purposes. Much has been said recently regarding the allowance of Federal income taxes on a normal-year basis rather than on the basis prevailing in a so-called "abnormal year." Our difficulty here lies in the necessity for making a distinction between normal and abnormal taxes. It is true that rates of taxation imposed during the year 1941 and proposed for the year 1942 are substantially in excess of rates imposed in prior years. However, it requires very little imagination to foresee that the proposed rate for 1942, while such rate is abnormal as compared with the rates in effect in prior years, may well be a normal or even a subnormal rate for some years to come. After weighing all factors
227 to the best of our ability, we conclude that for the purpose of determining the amount available for rate increase for the rate year beginning September 1, 1942, the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable. Such a calculation will result in a further decrease of $115,863.09 in adjusted oper-

ating expenses and will eliminate the adjustment of $4,929.39 to provide for increase in taxes under the provisions of Section 6 of the sliding scale arrangement.

With respect to excess profits taxes, we are of the opinion that no increase in rates should be predicated upon the liability of a utility for excess profits taxes. For this reason we have disallowed as an operating expense for the test year ended June 30, 1942 the excess profits tax of $43,928.02, in order to prevent the direct inflationary effect which such allowance would invite.

The record indicates that the Company will not be liable for excess profits tax for the year 1942. However, to guard against the possibility that any increase in rates might result in the imposition upon the Company of liability for excess profits taxes on revenue derived from such rate increase, we requested the Company to propose a protective arrangement which would obviate such a possibility. The arrangement proposed by the Company, which in our opinion will achieve the desired result, is set forth below:

"In the event such increased rates would result in the payment of excess profits taxes by the Washington Gas Light Company, any portion of the amount derived from the increased rates hereinafter authorized, which, if retained by the Company would be subject to excess profits tax, shall be recorded in a specially provided deferred credit account. The amount derived from increased rates shall be deemed to be 2.28% of the amount billed for sales of gas subsequent to the effective date of this order. The above stated percent is the ratio of the increase authorized herein to the total sales of gas for the test year ended June 30, 1942, calculated at the rates hereinafter authorized.

"The amount recorded in the deferred credit account as of December 31, 1942, and as of December 31st of each year thereafter so long as this order shall remain in effect, shall be returned to the gas customers in the District of Columbia by appropriate deductions from gas bills rendered to such customers as soon after December 31st as practicable. The amount of individual refunds

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shall be determined by ascertaining, by classes of service, the relation of the amount refundable to the total amount billed during the month of December and applying such percentage to each customer's December bill. Refunds so determined shall be shown as credits on customers' bills as soon after December 31st as practicable. In the event the amount recorded in the deferred credit account as of December 31st is less than $10,000, such amount shall be treated as operating revenue."

Financial Position of Company

There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of expending its plant to meet the growing demands for gas service. We must weigh the necessity for an increase in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The District of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service.

It is a matter of record that the Company recently attempted to sell 40,000 shares of $5.00 cumulative preferred stock, but was successful only to the extent of being able to sell 18,206 shares of this stock. This was due to a number of factors, and a recitation of events and facts preceding and subsequent to the offering of this stock shows that the financial position of the Company merits our most serious consideration.

On January 17, 1941, the Company filed an application with this Commission for authority to increase its capitalization by 90,000 shares of $4.25 preferred stock. Due principally to the lack of a quorum on the Commission this application was not acted upon until March 26, 1942 (Order No. 2221). At that time, due to depressed market condi-

tions, the Company was unable to sell this newly created stock and endeavored to sell 40,000 shares of its $5.00 cumulative preferred stock with the result heretofore stated.

229 In approving the sale of the $5.00 stock the Commission considered, among other factors, the financial position of the Company as of December 31, 1941. At that time income deductions and preferred dividends were earned 1.88 times, and the earnings per share of common stock were $2.24. Our order was issued April 21, 1942, and income for the twelve months ended April 30, 1942, showed that income deductions and preferred dividend coverage had declined to 1.75 times, while earnings per share of common had declined to $1.96. For the twelve months ended July 31, 1942, the former figure had declined to 1.67 times and the latter to $1.80. This decline in income is not due entirely to increased provision for Federal income taxes. Substantial increases in the cost of labor and material have occurred during the period under discussion, and such increases have been provided for only in part in the determination of the amount available for rate increase. Labor costs included in operating expenses for the test year under consideration exceed labor costs for the prior test year by more than $300,000, a part of which was attributable to the increased volume of business.

Increase in Rates Warranted

After careful consideration of all factors having a bearing on this case, including the fact that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding scale arrangement, we are of the opinion that, after making the adjustments hereinbefore approved, the amount available for increase in rates under the sliding scale arrangement for the rate year beginning September 1, 1942 is $201,424.74.

This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It

will, however, tend to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure.

The amount of $201,424.74 was determined as follows:

	Adjusted Operating Revenues		$8,918,656.27
230	Adjusted Operating Expenses		7,301,988.67
	Net amount available for return prior to adjustment allowed under Section 6 of Order No. 1458		$1,616,667.60
	Adjustment under Section 6 of Order No. 1458		
	Production Labor	$20,043.06	
	Production Fuels	41,572.89	(61,615.95)
	Adjusted amount available for return		$1,555,051.65
	Return allowed (6½% of Rate Base of $28,088,322.57)		1,825,740.97
	Deficiency in return		270,689.32
	Amount available for rate increase for rate year beginning September 1, 1942 (¾ of Deficiency)		203,016.99
	Less: Undistributed portion of amount available for reduction of rates for rate year beginning September 1, 1940		(1,592.25)
	Net amount available for rate increase		$ 201,424.74

It will be noted that the final conclusion as to the net amount available for increase in rates is $123,293.32 less than the amount determined by the Commission's staff. This difference is due to the elimination from operating expenses of the $90.00 conceded by the Company (see Footnote 2—Page 7) and to the computation of the accrual for Federal Income Taxes at 31% rather than 40%.

Disposition of Amount Available for Increased Rates

The Company revised rate schedules which would increase its annual revenues by $357,500. This amount is $156,075 in excess of the amount that we have concluded is available for rate increase. The staff of the Commission has prepared new rate shcedules providing increased annual revenue of $200,141, to be apportioned among the different classes of consumers as follows:

Residential	$ 53,429
Commercial	35,908
Domestic Space Heating	101,208
Commercial Space Heating	6,387
Seasonal Off Peak	218
Wholesale Apartment House	2,991
	$200,141

The difference of $1,283.74 between the above amount and the amount found available for rate increase will be held available for future rate increase.

231 The rate schedules presented by the Company eliminated the present separate schedule for space heating, proposing to include future consumption for that purpose along with regular domestic or commercial use. This will eliminate the necessity of maintaing two separate meters on premises using gas for both space heating and domestic or commercial purposes. We conclude that, in view of a possible meter shortage, the elimination of the separate space heating schedule is warranted, and the schedules submitted by the Commission's staff have been prepared on this basis. We further conclude that the apportionment of the $200,141 as the amount available for increase in rates is fair and equitable.

Effect of Increased Rates

The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase.

Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating cutomer's bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year.

The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only about 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies.

Conclusions and Findings

We conclude and find as follows:

(1) That the rate base for determining rates to be charged by the Washington Gas Light Company under the sliding scale arrangement for the twelve-month period beginning September 1, 1942, is $28,088,322.57, including working capital of $1,172,656.02, $597,044.81 of which is for cash working capital and $575,611.21 for materials and supplies.

(2) That gross operating revenues during the test year ended June 30, 1942 amounted to $8,918,656.27; that adjusted operating expenses including taxes amounted to $7,301,988.67; that the adjustments providing for increase in certain operating costs in accordance with Section 6 of Order No. 1458 amount to $61,615.95; that the amount available for return is $1,555,051.65; that the amount to be reflected in increased rates for the rate year beginning September 1, 1942, after considering $1,592.25 remaining from the amount available for rate decreases authorized by Order No. 1921 dated August 23, 1940, is $201,424.74.

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(3) That the amount of $201,424.74 should be distributed: $53,429 to Schedule "A," $101,208 to domestic space heat-

ing customers formerly served under Schedule "B" who will hereafter be served under Schedule "A," $35,908 to Schedule "C," $6,387 to commercial space heating customers formerly served under Schedule "B" who will hereafter be served under Schedule "C," $218 to Schedule "E," $2,991 to Schedule "F," and $1,283.74 to subsequent years' rate adjustment.

An appropriate order will issue.

By the Commission (Chairman Flanagan and Commissioner Kutz). Commission Hankin dissents for the reasons stated in the accompanying dissenting opinion.

E. J. MILLIGAN
Executive Secretary

October 13, 1942

288 Public Utilities Commission of the District of Columbia

Order No. 2401

October 13, 1942.

In the matter of Rates, Tolls, Charges, Tariffs, Rules, Regulations, and Conditions of Service of Washington Gas Light Company.

Formal Case No. 316.

In accordance with the opinion rendered in this proceeding, It Is Ordered:

Section 1. That the rate base for determining rates to be charged by the Washington Gas Light Company under the sliding scale arrangement for the 12-month period beginning September 1, 1942, be $28,088,322.57, including $1,172,656.02 for working capital.

Section 2. That the rates, tolls and charges to be charged by the Washington Gas Light Company for gas service in the District of Columbia shall be in accordance with the following rates, tolls, charges, tariffs, rules, regulations, and conditions of service.

. . . . . .

300 Section 3. That, under the terms of the sliding scale arrangement, the rates, tolls, charges, rules, regulations, and conditions of service herein prescribed became effective as of September 1, 1942. However, the Commission directs the attention of the Company to the provision contained in the Act approved October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", which reads as follows:

"The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Section 4. That, in the event the increased rates authorized in Section 2 hereof would result in the payment of excess profits taxes by the Washington Gas Light Company, any portion of the amount derived from such increased rates, which, if retained by the Company would be subject to excess profits tax, shall be recorded in a specially provided deferred credit account. The amount derived from increased rates shall be deemed to be 2.28 per cent of the amount billed for sals of gas subsequent to the effective date of this order. The above stated per cent is the ratio of the increase authorized herein to the total sales of gas for the test year ended June 30, 1942, calculated at the rates herein authorized.

The amount recorded in the deferred credit account as of December 31, 1942, and as of December 31st of each year

thereafter so long as this order shall remain in effect, shall be returned to the gas customers in the District of Columbia by appropriate deductions from gas bills rendered to such customers as soon after December 31st as practicable. The amount of individual refunds shall be determined by ascertaining, by classes of service, the relation of the amount refundable to the total amount billed during the month of December and applying such percentage to each customer's December bill. Refunds so determined shall be shown as credits on customer's bills as soon after December 31st as practicable. In the event the
301 amount recorded in the deferred credit account as of December 31st is less than $10,000, such amount shall be treated as operating revenue.

By the Commission:

A True Copy:

* * * * * * * * * * *

302 Before the Public Utilities Commission of the District of Columbia

In the matter of Rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company

Petition for Vacation of Order of October 13, 1942, and for Reopening of Proceeding, and for Leave to Intervene

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration on behalf of James F. Byrnes, Director of Economic Stabilization, and respectfully petitions the Commission to vacate its order of October 13, 1942, and to reopen this proceeding and to allow this petitioner to intervene in such reopened proceeding, and in support of said petition respectfully shows:

1. Hearings in this proceedings, which was instituted by order of March 20, 1942, were concluded on September 30, 1942.

2. The Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes", provides, among other things:

"That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

3. By virtue of the authority vested in him by the Constitution and the statutes, particularly said Act of October 2, 1942, and "in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prose-
303 cution of the war," the President, by Executive Order 9250, dated October 3, 1942, established the Office of Economic Stabilization, and has appointed James F. Byrnes as the Director thereof.

4. Paragraph 4 of Title VI of said Executive Order provides that:

"The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942."

5. On October 13, 1942, this Commission issued its findings, opinion, and order in this proceeding. Said order prescribes rates, tolls, and charges which will result in a general increase in the rates and charges which were in effect on September 15, 1942.

6. The rates, tolls, and charges prescribed in said order of October 13, 1942, are proposed to be made effective as of September 1, 1942, a date prior to the issuance of such order.

7. The Commission's order of October 13, 1942, was issued without notice to the Director of Economic Stabilization, and without having accorded the Director of Economic Stabilization the opportunity of "timely intervention," as provided in the Act of October 2, 1942.

8. In order to effectuate the provisions of Paragraph 4 of Title VI of Executive Order 9250 and of Section 1 of the Act of October 2, 1942, the Director of Economic Stabilization, on October 14, 1942, has by order (Order No. 1) designated "the Price Administrator of the Office of Price Administration as the representative of the Director of Economic Stabilization to receive notices of increases in common carrier or other public utility rates and charges, with authority to issue appropriate regulations for the receipt of such notices and to intervene and participate in proceedings before Federal, State, and municipal authorities in connection with proposed increases in such rates and charges, subject to such directives on policy as may be issued by the Director."

9. The issuance of said order of October 13, 1942, without notice to the Director of Economic Stabilization, or his designee, and without permitting opportunity to intervene in this proceeding, is invalid and constitutes a
304 denial to the Director of Economic Stabilization of his right to appear in this proceeding for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities.

Wherefore petitioner prays: (1) That the order of October 13, 1942, in this proceeding be vacated; (2) that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument herein; (3) that your petitioner be allowed to intervene and to file a brief in such reopened proceeding; and that the Commission

enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration

On Behalf of
JAMES F. BYRNES
Director of Economic Stabilization

By DAVID GINSBURG
General Counsel

HARRY R. BOOTH
Utilities Counsel
Legal Division
Office of Price Administration

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Public Utilities Commission
of the District of Columbia

Order No. 2404.

October 23, 1942.

Formal Case No. 316.

In the matter of Rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company.

The Commission has given consideration to the petition filed on behalf of the Director of Economic Stabilization by the Price Administrator of the Office of Price Administration, wherein request is made for a reopening of the proceedings in this case "for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as

amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities," and more particularly the increase in rates authorized by Order No. 2401. The Commission has likewise reconsidered all the proceedings in this case, including the following facts:

On March 20, 1942, the Commission issued an order directing an engineering and accounting investigation to be made relative to the rates, tolls, charges, tariffs, rules and regulations, and conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding scale arrangement, which prescribes the "rate year" from September 1 to August 31. Notice of intention to hold a formal public hearing upon the subject matter of the investigation was included in the order. A detailed investigation was made by the staff of the Commission, extending from April, 1942, to August, 1942.

Under date of July 21, 1942, the Commission gave formal notice of a public hearing to be held on August 18, 1942.

On August 14, 1942, a prehearing conference was held, which was attended by members of the Commission, its staff, and utility counsel of the Office of Price Administration (the same counsel now appearing on the petition filed herein), and counsel and staff of the Gas Company.

On August 18, 1942, formal public hearing was begun, at which hearing the Office of Price Administration, through its utility counsel, was permitted to intervene and to become a party to this proceeding with the consent of the Washington Gas Light Company.

307 During the course of the hearing on August 19, counsel for the Office of Price Administration asked that the hearing be continued in order to permit him to prepare for cross-examination of the witnesses who had appeared, and to prepare testimony to be presented on behalf of the Office of Price Administration, which request was granted, and the hearing was continued for such purposes for a period of two weeks.

The proceeding was reconvened and further hearings took place on September 4, 8, 11, and 14, during which time the Office of Price Administration, through its counsel, cross-examined witnesses and presented testimony.

The record was closed on September 14, and all interested parties, including counsel for the Office of Price Administration, were given until September 25 to file briefs. On that date the Office of Price Administration, through its counsel, filed a brief.

On September 25, 1942, the Commission granted petitions of the Fort Davis Citizens' Association and Washington League of Women Shoppers to intervene. Pursuant to the order granting leave to these petitioners to intervene, the proceeding was reopened, and was set for further formal public hearing on September 30. Counsel for the Office of Price Administration participated in the reopened proceedings and filed a supplemental brief.

On October 13, 1942, the Commission rendered its findings and opinion and issued Order No. 2401, prescribing new rates which, under the sliding scale arrangement, became effective for the "rate year" beginning September 1, 1942.

Notwithstanding the fact that the record in this case was closed prior to the approval of the Act of October 2, 1942, the record and proceedings clearly indicate that the Commission followed in substance the provisions of that Act. However, in view of the petition filed on behalf of the Director of Economic Stabilization, the Commission will reopen the record for the purpose of receiving additional evidence from the Office of Price Administration on behalf of the Director of Economic Stabilization as hereinafter ordered.

It Is Ordered:

Section 1. That the record in this proceeding be, and the same hereby is, reopened for the purpose of receiving from the Office of Price Administration, on behalf of the
308 Director of Economic Stabilization, additional evi-

dence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose.

Section 2. That the reopened proceedings be set for formal public hearing on Monday, November 2, 1942, at 10 a. m., in Room 500, District Building.

By the Commission: (Chairman Flanagan and Commissioner Kutz), Commissioner Hankin dissenting.

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316 Before the Public Utilities Commission of the District of Columbia

In the matter of Investigation of rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company

P. U. C. No. 3305

Formal Case No. 316

Petition for Amendment of Order No. 2404 of October 23, 1942, and for Stay of Order No. 2401 of October 13, 1942.

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, and respectfully petitions that the Commission amend its Order No. 2404 of October 23, 1942, and stay its Order No. 2401 of October 13, 1942, and in support of such petition respectfully shows:

1. On October 13, 1942, the Commission issued its opinion in this proceeding setting forth certain findings with respect to the rates and charges and revenues of the Washington Gas Light Company and, in accordance therewith, issued its Order No. 2401 prescribing certain schedules of rates and charges to be demanded and received by the Washington Gas Light Company, which rates and charges are in excess of those which were in effect on September 15, 1942, for service rendered by the Washington Gas Light Com-

pany. The increased rates and charges so ordered are proposed to be made effective as of September 1, 1942.

2. On October 19, 1942, Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, filed with this Commission a petition requesting:

(1) That the Order of October 13, 1942, in this proceeding be vacated; (2) that the proceeding be reopened
317 for the purpose of receiving further evidence and hearing further argument herein; (3) that the Director of Economic Stabilization be allowed to intervene and to file a brief in such reopened proceeding; and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

3. On October 23, 1942, the Commission acting upon said petition of October 9, 1942, ordered:

"Section 1. That the record in this proceeding be, and the same hereby is, reopened for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose.

Section 2. That the reopened proceedings be set for formal public hearing on Monday, November 2, 1942, at 10 a. m., in Room 500, District Building."

4. Said order No. 2404 of October 23, 1942 is only a partial grant of the relief prayed for by the Director of Economic Stabilization, in that it illegally restricts the right of intervention by the Director of Economic Stabilization, and in that it unnecessarily restricts the type of evidence which may be received at the further hearings to be held in this matter, and in that it neither grants nor denies the request that the Commission Order No. 2401 of October 13, 1942, be vacated.

Wherefore petitioner prays: (1) That the Commission amend its Order No. 2404 of October 23, 1942, and without further delay grant the specific relief prayed for in the said petition of October 19, 1942, filed on behalf of the Director of Economic Stabilization, and permit full intervention by the Price Administrator on behalf of the Director of Economic Stabilization and make him a party to this proceeding, and without restriction as to the type of evidence to be presented or otherwise limiting the scope of further hearings to be held in this matter; (2) that the Commission, if it refuses to vacate its order of October 13, 1942, as requested in said Petition of October 19, 1942, that it immediately stay the operation thereof pending further hearings and decision in this matter; and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration

On Behalf of

JAMES F. BYRNES
Director of Economic Stabilization

318 By DAVID GINSBURG
General Counsel

NATHANIEL L. NATHANSON
Assistant General Counsel

HARRY R. BOOTH
Utilities Counsel
Legal Division
Office of Price Administration

319 Public Utilities Commission
of the District of Columbia

Order No. 2418.

November 9, 1942.

Formal Case No. 316

In the Matter of Rates, Tolls, Charges, Tariffs, Rules, Regulations and Conditions of Service of Washington Gas Light Company.

On October 19, 1942, the Price Administrator of the Office of Price Administration filed with this Commission a petition, on behalf of the Director of Economic Stabilization, wherein request was made for a reopening of the proceedings in this case "for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities." The petition also asked that Order No. 2401 be vacated and that the petitioner be permitted to intervene in the reopened proceedings.

By Order No. 2404, the Commission, on October 23, 1942, acting upon the said petition, reopened these proceedings for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and the petitioner was granted leave to intervene for such purpose. The reopened proceedings were set for formal public hearing on November 2, 1942.

No testimony was adduced by the Price Administrator at the reopened hearing on November 2, and at the conclusion of the hearing on that date, counsel for the Price Administrator moved that the case be continued until 10 o'clock a.m. on November 4 in order to permit him to con-

sult with his associates as to future steps to be taken in the proceeding. Accordingly, the hearing was continued until November 4, at which time counsel for the Price Administrator presented evidence to show that the amount used by the Washington Gas Light Company for Federal income taxes in its determination of the amount available for increase in rates under the sliding scale arrangement was overstated by approximately $18,000.00. This was due to the fact that the Revenue Act of 1942 as finally approved contained a provision exempting from surtaxes that portion of the Company's income paid out as preferred stock dividends, which provision was not included in the draft of the bill upon which the original computation for income taxes was made. This was the only evidence offered.

In determining the amount available for rate increase under Order No. 2401, we used neither the computation of the Company nor the Commission's witness, but sub-
320 stituted, as a reasonable allowance for Federal income taxes, an amount of $378,554.30, such amount being 31% of the Company's taxable income for the test year ended June 30, 1942. It can thus be seen that the evidence presented by counsel for the Price Administrator produces a figure for Federal income taxes approximately $130,000.00 in excess of the amount actually allowed in our determination under Order No. 2401. The evidence adduced fails to show that the rates authorized by Order No. 2401 are inflationary. Accordingly,

It is Ordered:

That the petition of the Price Administrator of the Office of Price Administration, on behalf of the Director of Economic Stabilization, that Order No. 2401 be vacated, be, and the same is hereby, denied.

By the Commission. (Commissioner Hankin dissents for the reason stated in his dissenting opinion).

* * * * * * * * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS DESIGNATED BY APPELLANT.

469 Before the Public Utilities Commission of the District of Columbia.

P. U. C. No. 3305, Formal Case No. 316

In the Matter of: Investigation of rates, tolls, charges tariffs, rules, regulations and conditions of service of the Washington Gas Light Company.

Room 500,
District Building,
Washington, D. C.,
August 18, 1942.

Met pursuant to notice, at 10:00 a. m.

Present:

Gregory Hankin, Chairman.

James M. Flanagan, Vice-Chairman.

Commissioner C. W. Kutz, Engineer Commissioner.

E. J. Milligan, Executive Secretary, P. U. C.

Lloyd B. Harrison, Special Assistant, Corporation Counsel.

H. L. Booth, O. P. A.

John Keane, D. C. Gas Employees Union.

Andrew McNamara, Machinists' Union.

Present also:

Marcy L. Sperry, President, Washington Gas Light Company.

E. S. Boothy, Vice-President, Washington Gas Light Company.

Robert C. Owers, Treasurer, Washington Gas Light Company.

470 O. H. Ritenour, Assistant Treasurer, Washington Gas Light Company.

Stoddard M. Stevens, E. Barrett Prettyman, and C. Oscar Berry, counsel, Washington Gas Light Company.

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471 *Proceedings.*

The Chairman: The hearing will come to order.

This is the annual hearing on the rates of the Washington Gas Light Company, which is set under the sliding scale plan. I will ask the parties to note their appearances. Is there anyone representing the Washington Gas Light Company here?

Mr. Prettyman: The Washington Gas Light Company appearances are Stoddard M. Stevens of New York, C. Oscar Berry and E. Barrett Prettyman of Washington.

Mr. Harrison: Lloyd Harrison for the Commission.

Chairman Hankin: Anyone else?

Mr. Booth: I would like to enter the appearance of the Office of Price Administration by H. L. Booth, Utilities Counsel.

I do not know whether this would be the proper time, Mr. Chairman, if the Commission please, but I have a petition here for leave to intervene. I should like to file that petition with this Commission at this time on behalf of the Office of Price Administration.

I regret to say that we were unable to comply with the rules of this Commission which require prior notice to the parties with respect to petitions of this character.

472 The decision to seek the Commission's approval for leave to intervene was reached only late yesterday, if the Commission please, and I was unable to advise counsel for the company until this morning of that decision. I advised counsel in a general way of the nature of this petition for leave to intervene (hands papers to members of Commission).

If I may, I would like to refer very briefly to its contents.

The petitioner is the Price Administrator of the United States. This office was created by the Emergency Price

Control Act of 1942. The functions and duties of the Administrator under that Act are to stabilize prices and prevent speculative and abnormal increases in prices, to eliminate and to prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities caused by or contributing to the national emergency; assuring that defense appropriations are not dissipated by excessive prices.

Protecting persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent upon life insurance, annuities and pensions, from undue impairment of their standard of living, and
473 preventing a post-emergency collapse of values.

The program of the Office of Price Administration to stabilize commodity prices and costs of living is essential to the success of the war effort.

In accordance with the purposes of the Emergency Price Control Act, the Office of Price Administration has undertaken to stabilize commodity prices and the cost of living throughout the country by a series of maximum price regulations. Indeed, general price increases have appeared to be such a grave threat to the efficient production of war materials and to the stability of the national income, that the Office of Price Administration, within the limits of statutory authorization, has established maximum selling prices for all commodities and services.

The immediate purpose of these regulations is to guarantee to the American people that every living cost will remain stable and that the cycle of increasing prices, increasing wages, leading to disastrous inflation, may be averted.

The Washington Gas Light Company is a utility engaged in the business of supplying gas service to domestic commercial and industrial consumers in the District of Columbia at rates and charges which are subject to the
474 jurisdiction of the Public Utilities Commission of the District of Columbia. We of course recognize that utility rates are exempt from the jurisdiction of the Office

of Price Administration under the Emergency Price Control Act.

It appears that payments for gas service represent a regular item in the cost of living of a vast majority of residents in the District of Columbia.

This Commission by its order of December 13, 1935, established a sliding scale arrangement for determining the rates and charges which the company shall be allowed to demand and collect for supplying such gas service.

Pursuant to the provisions of said sliding scale arrangement the Commission has entered upon an investigation for the purpose of determining, among other things, the amount to be applied for the decrease or increase of rates during the rate year commencing September 1, 1942, and has directed that a hearing be held thereon commencing August 18, 1942.

This company, so we are informed, contends that its net earnings during the fiscal year ended June 30, 1942, were approximately $464,000 less than it was entitled to earn under the provisions of said sliding scale arrangement. It, therefore, seeks to have an increase of approximately
475 $387,122 applied during the rate year commencing September 1, 1942, and requests that its schedule of rates be adjusted accordingly.

It is contended by the company that according to the provisions of said sliding scale arrangement of December 1, 1935, the company is entitled to such increase in rates and charges to compensate it for the difference between the actual return earned during the last fiscal test year and the return which it was permitted to earn under the arrangement. To a certain degree the alleged deficiency is made up because of alleged estimated increases in Federal income and surplus profit taxes.

The approval of an increase in utility rates because of increased Federal income taxes would be contrary to the intention of the Congress, inflationary in character and would adversely affect the program and policies of the Office of Price Administration to stabilize prices.

It appears that this is the first time since the United States entered the war that the Commission is called upon to make a determination or to fix rates under said sliding scale arrangement. The application of the arrangement should be reconsidered in the light of the Government's program to prevent inflation and to stabilize the cost of living.

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We also suggest that the question of under what circumstances rates and charges for gas service should be increased during this period of national emergency resulting from the war, is one of basic national importance, in which the Office of Price Administration has a substantial interest.

For these reasons, if the Commission please, we ask that we be given the right to intervene. We ask that the Commission waive its rule requiring customary notice and that we be made a party to this proceeding.

Chairman Hankin: Mr. Prettyman?

Mr. Prettyman: Mr. Chairman, we have no objection to the waiving of the rules with regard to notice. It is true, as Mr. Booth has just said, we received notice only a very few minutes ago. Mr. Booth was kind enough to call me on the telephone and tell me about it. However, we do not want to be in the position, by waiving notice, of assenting to the proposition that the Office of Price Administration has an actual place in a proceeding of this sort or that they have any function to perform in a proceeding like this. That is a matter for the Commission to decide upon the petition. Also, we do not want to be put in the posi-

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tion of conceding any of the statements of fact that are in the petition, particularly in regard to the increase being based upon an estimate of taxes, because there is no estimate of next year's taxes involved. The computation relates to the actual taxes paid last year, and even in that view, only one-third of the amount involved here—as a matter of fact about only one-fourth—would in any way be affected by the treatment of taxes, even if all of the taxes were thrown out.

Mr. Harrison: If the Commission please, Mr. McNamara is in the hearing room, and—

Chairman Hankin: Are you going to speak on this particular question?

Mr. Harrison: No, I was just going to refer to another appearance. I am sorry.

Chairman Hankin: The Commission rules that the requirement in the rules that a petition for intervention be filed within five days before the hearing, will be waived in this case, and the Office of Price Administration will be granted leave to intervene—the Administrator will be granted leave to intervene in this matter.

Mr. Keane: I do not wish to file a petition to intervene but I would like to have the record show that the Dis-
478 trict of Columbia Gas Employees Union is represented in the hearing by counsel. I do not wish to take an active part but I would like the record to show the Gas Company Union is represented by counsel.

Chairman Hankin: By counsel?

Mr. Keane: Yes.

Chairman Hankin: Who is counsel?

Mr. Keane: I am, John Keane.

Chairman Hankin: You are a member of the Bar?

Mr. Keane: Yes, sir.

* * * * * * * * * * *

482 Chairman Hankin: Prior to this hearing, this Commission, on August 14th, held a prehearing conference with representatives of the Washington Gas Light Company. The conferees at that conference representing the Washington Gas Light Company were Mr. E. Barrett Prettyman, Mr. Robert C. Owers and Mr. O. H. Ritenour, and for the Commission the conferees were Mr. McElfresh, Mr. Falk, Mr. Nicholson and Mr. Harrison.

These conferees concluded that they wished to bring up at this hearing, questions relating to the following items:

1. Contribution to the National Capital Committee;

2. Depreciation on appliances on display;

3. Transfer from sales promotion to merchandise and jobbing;

4. Treatment of expenses of financing not carried out;

5. Contribution to United Service organizations;

6. Treatment of excess profits taxes;

7. Adjustment on account of rise in cost of fuel, the issue being as to what inventory figure to use in making the adjustment.

483 In addition, at the prehearing conference, a number of questions were raised, and on April 17th I addressed a memorandum to the Commission stating what additional questions would be raised in this hearing and specifying the items which would constitute the subject of the hearing. I should like to read this memorandum into the record so that we will all know what these items are.

In addition to the seven questions raised by the conferees at the prehearing conference held on Friday, August 14th, I desire to raise a number of additional questions, some of which will require testimony, while others raise only questions of law.

1. In the rate base of July 1, 1941, excluding working capital, there is included an item of $1,055,549.52, representing the difference between the appraised value, as of June 30, 1935, and the original cost. All other items representing plant account are substantially the book value and are treated as the original cost in the proposed reclassification under the Uniform System of Accounts.

Query: Should the $1,055,549.52 be retained as part of the rate base?

484 This question does not require the taking of testimony, unless it should be decided that the $1,055,549.52 be excluded from the rate base. If it is decided that it should be excluded, then an opportunity should be afforded to the company to establish that the excess appraisal value over and above original cost is less than this account.

Refrigerators	$60,424.50
Househeating appliances	167,441.47
Househeating appliances—Utilization Dept.	1,727.08
Commercial appliances	33,697.68
Commercial appliances—Utilization Dept.	59.14
Commercial appliances—Government Sales Dept.	442.92
Other appliances and miscellaneous (ranges and water heaters)	135,518.60
Other appliances and miscellaneous (ranges and water heaters)—Utilization Dept.	25.38
Maintaining Installations	41,478.05
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(51,716.48)
	$389,098.33

Query: Are these items properly chargeable to the Company's operations as a public utility, or are they really expenses of the Company's appliance business? This is a question which will require the taking of testimony in
485 order to afford the company an opportunity to show that any or all of these items are properly chargeable to its sale of gas.

3. Sales Promotion Expenses are charged in the amount of $216,072.27, including the following items:

Supervision	$83,577.50
Salaries and commissions	92,901.74
Demonstration	20,840.46
Advertising	49,794.81
Miscellaneous Sales Expense	27,636.37
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(31,330.38)
	243,420.50
Adjustment by P. U. C. staff	27,348.23
	$216,072.27

The following questions are raised with reference to these items:

(a) Are promotion expenses properly chargeable to the consumer?

(b) Assuming that sales promotion expenditures are permissible as charges against the consumer, are these particular expenditures properly chargeable to the consumer?

(c) Are any of these expenditures really chargeable to the Company's appliance business?

486 If the first question is answered in the negative, then there is no need of taking any testimony. If it is answered in the affirmative, then, of course, it is necessary to take evidence.

4. Among the items of Administrative and General Expenses, there is included a classification of General Officers and Executives. Among these, it appears, the President of the Corporation was paid $31,666.59, the Vice President and General Manager $18,000, the Vice President and Treasurer, $15,000.00, the Assistant Vice President $8,800.00, the Comptroller $8,561.54, and the Secretary $6,600.00; also the Budget Director at the rate of $700.00 per month, the Executive Assistant $500.00 per month, the Auditor $458.32 per month, and the Chief Accountant $450.00 per month. In addition, the General Counsel of the Company, not employed exclusively by the Company, is paid at the rate of $18,000 per year. These officers and employees of the Company render services both to the public and to the stockholders. The question involved is whether there should be a division between the rater-payers and the stockholders, in the payment of these salaries, and, if so, how much should the rate-payer be required to pay.

487 5. There is charged an amount of $38,198.62 for employees welfare, including the following items:

Group Insurance Premiums		$27,378.32
Miscellaneous		
Two-thirds of Safety Department's Expenses	$8,729.02	
Salary of Band Leader	1,200.00	
Quarter-Century Dinner	542.19	
Bowling Team Expenses	150.00	
Medical Examination to determine fitness for service	26.00	
Miscellaneous	173.09	10,820.30

In the same category as the above belongs an item of $20,592.32 for pensions, and a payment of $5,000.00 to Towers, Perrin, Foster & Crosby for personal services in relation to employees' retirement plan study.

The question here involved is whether any, or all, of these expenditures are properly chargeable to the Company's business of selling gas to the public, or whether they are the type of charges which should be borne by the company itself.

6. Among the miscellaneous expenses are items as to which the question arises whether the expenses are
488 incurred solely for the benefit of the stockholders, and whether the rate-payer should be required to pay any part of these expenses. These are:

Trustees and Transfer Agents' Fees		$13,436.44
Reports to stockholders and expense of stockholders' meetings		1,748.13
Treasurer, New York Stock Exchange—annual fee		375.00
American Bank Note Co.—Imprints on stock certificates		205.85
Dividend notices:	$70.31	
	68.11	
	69.09	
	70.07	277.58

Some of the items of expenses are in the nature of contributions, which property should be charged to the company, rather than the rate-payer, on the theory that the company should make its own contributions for charity, rather than to contribute other people's money. These are:

Tickets to Police and Fire Outing	$10.00
Tickets to Police and Fire Field Day	30.00
Tickets for representatives of the Company to dinner for retiring Sup't of Police	50.00;
also to educational institutions:	
Institute of Gas Technology	$1,668.30

489 7. The reasonableness of certain membership dues or subscriptions to publications should be justified by the company; for example:

Association dues	$5,985.15
American Management Association	100.00
U. S. Chamber of Commerce	150.00
National Association of Manufacturers	100.00
National Industrial Information Committee	250.00
Merchants and Manufacturers Association	50.00
Better Business Bureau	225.00

8. Of the total taxes paid by the company, in the sum of $1,099,333.63, a question is raised as to the propriety of charging the following taxes to the rate-payers:

Federal Capital Stock Tax	$35,400.00
Prince George's Capital Stock Tax	70.50
Maryland State Capital Stock Tax	1,779.18
County Capital Stock Tax	10,905.43
Federal Income Tax	$598,733.86, of which 63,663.79 is Excess Profits Tax
District of Columbia Income Tax	48,763.81

(The foregoing figures are prior to allocation and
490 adjustment.)

In this connection, a question is also raised concerning an expenditure made to Stone and Webster for services and expenses of K. P. Teele for Excess Profits Taxes, in the sum of $439.05.

The sliding scale plan adopted by Order No. 1458, does not contemplate that the rate base be inflated or that items may be improperly charged to operating expenses. Ordinarily, it is the duty of this Commission to scrutinize carefully all elements entering into the rate determination. With the adoption of the sliding scale plan, the duty of care is still greater. We are determining rates which will be effective not only until the next hearing, but which will have their effect on many years to come. Furthermore, with the rate base determined (once it is properly determined), and with no substantial questions relating to operating income, our task is greatly simplified. Therefore, we must, under all circumstances, pay special attention to the items of expense.

Although the order of investigation was issued last March, and the Commission's staff was supposed to scrutinize all items of expense preparatory to the hearing, the Company's books for the test year ending June 30, 1942, were not completed until this month. The members of the Commission had no opportunity to acquaint themselves with any part of this case until the day before the prehearing conference. To rely merely upon the report of our accounting staff as to the rate base, operating revenue and operating expenses would mean that we are divesting ourselves of the rate-making function very substantially. We might as well let our accountants determine the rates.

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But there is still another reason why we should, at this time, redouble our efforts to prevent rate increases resulting from improper charges as operating expenses. We are now at war. Congress and the Executive have decreed that our war effort requires the prevention of further unwarranted increases in price. This has been done, in part,

by the enactment of the Emergency Price Control Act of 1942. While utility rates are exempted by this Act, this exemption was made, in my judgment, because it was assumed that the regulatory agencies would exercise the closest scrutiny over rate increases, and that this policy of the National Government would become one of the dominant principles determining utility rates in war time. I believe that it is the obligation of this Commission to scrutinize to the fullest possible extent all requests for rate
492 increases.

I do not believe the previous inclusion of unwarranted items in the rate base and the fact that many of the items of operating costs have been accepted as a matter of course in previous years preclude an independent review of them at this time. I believe that counsel for the company, at the prehearing conference, agreed that the Commission is not precluded from reopening such questions as it believes necessary in the discharge of its obligations under the law, which is the correct law in this matter.

Mr. Prettyman: If the Commission please, at the conclusion of the prehearing conference, I requested a statement of the questions which would be raised, a formal statement of those questions, in order that the company might determine what procedure it would follow and what requests it would make, because the questions at that time were asked orally and only rough notes were made.

I might say we had not had a copy of the memorandum which you have read and did not know about it until you read it, but the questions relate to the same subject matter that the questions related to as were asked at the prehearing conference.

These questions raise a great many questions of
493 procedure. In the first place, the first question as to whether the rate base as stated in the sliding scale order should be amended to eliminate $1,000,000, we think, has no place in this proceeding. This proceeding was brought under an order which contemplates the determina-

tion of rates and charges pursuant to the sliding scale arrangement. The item to which the question is directed is an integral part of the sliding scale arrangement. So we think if the Commission is going to inquire into that question, as to whether the $1,000,000 should be included in the rate base, a proceeding should be brought directed to the question as to whether the rate base included in the sliding scale arrangement should be re-examined.

As soon as that question is raised, a great many questions then arise. The sliding scale arrangement rests principally on three propositions—three phases, I might say, or factors, the rate base, the depreciation and the rate of return. Those three together make a composite. As soon as you question one of them—if the Commission is going to raise a question as to one of them—it immediately raises the question as to the continuation of the sliding scale itself, and the company and the Commission would have to determine whether
494 if one of those elements is to be changes, they wish to abrogate the sliding scale, or go on with it.

In the next place, the question as to that item raises a great many questions of evidence and fact. The record, as the Commission knows, was taken over a good many years, relating to the property of the company, valuation, and so forth, which proceeding terminated in the sliding scale order. Obviously, if the question as to the figure at which land should be included in the rate base is to be re-examined, that old record will have to be re-examined and new evidence will have to be taken.

Now, because I am of the view that this question as to land goes to the sliding scale order itself and therefore should be raised in another proceeding, because this proceeding by the terms of the order is for determination of rates and charges pursuant to the sliding scale arrangement, I submit a motion that the question be stricken and ask for a ruling on the motion.

Mr. Stevens: On the question of the rate base, may I point out that you gentlemen are all familiar with the

Smythe and Ames cases, and the general law on the subject of valuation. This Commission in valuing the properties of the Washington Gas Light Company in its Order No. 1341 of March 19, 1935, gave consideration to original cost, reproduction cost new and depreciation. Now,
506 when the sliding scale rate base was arrived at, it was decided by the conferees, by the two parties to the agreement, that the rate base of $21,000,000 should for purposes of bookkeeping and accounting, be as near original cost for the physical property other than land as was possible. You will of course appreciate that from the standpoint of regulation and the company's operations and bookkeeping, it was very much better to put at least part of the rate base on original cost. The company was very careful at that time to say that because a certain part of the base was on an original cost foundation, it did not mean that in the normal valuation and rate procedure it was willing to go forward with that kind of a rate base, and the Commission at the time was thoroughly familiar with the position of the company.

Now, the land item was based on the actual finding of value made by the Commission. The Commission made a finding in its Order No. 1341 of the value of the company's lands. That value was less than the appraised value which was testified to by the witnesses for the company and by the witnesses for the Commission. In other words, the Commission found a value which was less than either.

Now, that land was acquired, a good part of it, be-
507 tween the organization of the company in 1848 and 1870, during a period when land values were so different than they are today in the City of Washington there is no comparison whatsoever, and it seemed to the Commission and to the company that the fair part of the rate base to be founded upon land should be founded upon the appraisal made of that land by the Commission. Mind you, the company was not satisfied with that appraisal. The Commission had appealed from the valuation and the com-

pany had good reason to believe the courts would have upset the Commission's appraisal; nevertheless, in the interest of getting on, this rate base was fixed on the Commission's own appraisement of this land. At no time, as far as I know, have the courts taken the position that original cost should be the rate base. I hope that answers your question, Mr. Hankin. If it does not, I will be glad to go further.

Chairman Hankin: Mr. Booth?

Mr. Booth: If the Commission pleases, this issue which has just been discussed, presents the fundamental question as to whether the Commission is precluded from giving consideration to the effect of war conditions upon the sliding scale arrangement and of the rate of return and the other fundamental aspects in determining whether or not
508 an increase in rates should be granted. I think that we ought to be heard upon the question.

It is true that the sliding scale arangement may be a very valuable device in fixing rates by a regulatory agency. However, the Commission in its 1935 order, clearly indicated that by entering into this arrangement it could not divest itself of jurisdiction to fix fair and reasonable rates, and I assume by that, in giving consideration to every important and necessary factor upon which fair and reasonable rates should be considered.

Moreover, on page 2 of its order the Commission, it seems to me, recognizes that the arrangement would have to be of a flexible character in order that it might give consideration to conditions as they might change from time to time.

In that connection let us consider first of all the question as to what is a fair rate of return. It may be that 6½ per cent after the payment of all expenses including taxes, may have been a fair rate of return in 1935 when this arrangement was entered into, but I think that the courts have held time and time again that what is a fair rate of return in one year may not be a fair rate of return in another year if economic conditions change. So it seems to me that here, with the company admitting that on its own figures

509 it is earning approximately 5 per cent after the payment of all expenses, including an allowance for all Federal income and surplus profits taxes, I think there would be a very serious question as to whether or not in view of the economic conditions which the nation faces today, the World war and the program of the Government to stabilize prices and prevent increases in the cost of living, whether or not a return of that character should not be considered adequate, at the same time giving due consideration to the obligation of the Commission in carrying out the sliding scale arrangement entered into with the company.

All we would like to do is to have a reasonable opportunity to present to the Commission the issues which we think the Commission ought to give basic consideration to before making an adjustment in the rates which the company seeks in this case. We do not want to delay this case undnly, but the facts were first called to our attention last Friday at the informal prehearing conference and we would like to have a reasonable opportunity to present our views to the Commission as to how we think the effect of the war and the program of the national government to prevent further increase in the cost of living, should
510 affect the determination which the Commission must make in this proceeding.

Chairman Hankin: Mr. Harrison, do you want to say something on this question of rate base?

Mr. Harrison: I do not have anything to say on that unless the Commission wishes to know my views on the subject. The rate base has been determined, as I understand it, and as the Chief Accountant will testify, according to the sliding scale plan that he understands it. I might say on the question of whether or not the rate base should be changed, I do believe that is one of the fundamentals in the application of the sliding scale plan, and on the question of the rate of return, since that question was raised, I would like to speak from recollection on that point as relates to the change in the rate of return of the Potomac Electric Power Company. My recollection is that was made the

matter of investigation by the Commission's order. Now, I distinctly remember when the question of the rate of return of the Washington Gas Light Company was first raised about two years ago, the Commission did include that matter because it was one of the basic elements in the sliding scale plan, in its order of investigation, and because of certain events the Commission deleted that one item in
511 the notice of hearing. So that the notice of hearing, as in this case, related only to the determination of the available amount for return and available amount for decrease or increase in rates, as the case may be.

Chairman Hankin: Mr. Prettyman, you covered only the first question I raised. Do you want to proceed with the other question?

Mr. Prettyman: I can, yes, sir. I have a motion before the Commission, of course, on that particular question.

Chairman Hankin: You may have an additional motion. We will act on those motions in executive session.

* * * * * * * * * *

V. A. McElfresh,

558 called as a witness on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Harrison: Will you state your name and position, please?

Mr. McElfresh: V. A. McElfresh; Chief Accountant for the Public Utilities Commisssion.

559 Mr. Harrison: Mr. Elfresh, as Chief Accountant have you had supervision over the matter of investigation of accounts of the Washington Gas Light Company and the Prince Georges Company for the purpose of this hearing?

Mr. McElfresh: Yes, I have.

Mr. Harrison: Will you state in a somewhat detailed manner the method of investigation, how thoroughly it may have been done, and the manner in which it was done, and

the number of men engaged and the approximate time, by some measure that you may have as to the detail and completeness of the examination of the records of the companies?

Mr. McElfresh: It has been the practice in examining the books of the Washington Gas Light Company and the Prince Georges Gas Company in connection with the determination of the amount available for increase or decrease of rates under the sliding scale arrangement, to make a fairly detailed audit of the operating expenses of these two companies as well as a spot check of conditions of the plant and retirements of plant that entered into the determination of the rate base.

Certain of the operating expense accounts are reviewed only to the extent of making comparison with prior years.

We endeavor to investigate as many accounts in
560 detail as possible.

On the question of services on customer premises for this particular year we did not make a detailed examination of the items included in this account. We have on prior years, and when I was an accountant working on this job I, myself, have made detailed examinations of the charges to this account.

The particular purpose of this detailed examination was to see whether or not the items included in this account related to the gas business of the company or to the appliance business.

Production expenses are examined in much the same manner as this account has been examined this year. There is little possibility for controversial items in production accounts.

Sales promotion expense were for this year, and for as long as I have had any knowledge of the audit of the books of this company, reviewed in considerable detail, with again the specific purpose in mind of determining the propriety of the charges included in these accounts, again with particular reference to whether or not they apply to the gas utility business or to the appliance business of the company.

Administrative and general expense are also gone into very thoroughly, because it is here that controversial items are apt to appear. Such items do appear and from
561 time to time are brought to the attention of the company by the accountants on the job, and as the company concedes these points the books are corrected and nothing further is done about that item.

I might say that in this year on sales promotion expense we discovered a misclassification of an item of $1,124.34 covering newspaper advertising which the company had charged as institutional advertising, and that the accountants felt properly belonged as general advertising.

General advertising covers advertising of appliances, and the practice of the company has been to charge 20 per cent of such general advertising to the appliance business of the company.

This correction was made on the books and we feel it is now in accord with the classification.

Mr. Harrison: At that point, that item, therefore, did not find its way in any of the exhibits that you will present later on as showing the adjustment in the accounts of the company, did it?

Mr. McElfresh: No, it did not.

Mr. Harrison: Because that is a matter that has been pointed out by policing of the accounts?

562 Mr. McElfresh: That is correct.

Mr. Harrison: And that is illustrative of the policing you perform over the accounts of the company in the course of this investigation?

Mr. McElfresh: That is right. I could go on at length along that line.

I believe you asked also a question of the extent of the audit in so far as time is concerned.

Mr. Harrison: Yes, I wanted to ask you particularly if you won't go into the extent of the investigation as to this service in connection with consumer premises.

Did you have anything more to say about that?

Mr. McElfresh: No, I think the distinction I have made about covers all I can say on that at this time.

There were two accountants engaged on this job; one of them, Mr. Falk, started on this work on March 30th. Mr. Nicholson started on March 26, and they have been engaged continuously on that from that time up until the present time.

The latter part of July, when the work increased due to summarizing the analyses that had been made, two other accountants were assigned to this job, one on the
563 23rd and one on July 30th.

All told Mr. Falk and Mr. Nicholson and the two other accountants have put in 1,927 man hours regular time on this assignment and 193 hours overtime, making a total of 2,110 man hours.

Mr. Harrison: Let me ask you about another police item.

It was earlier stated that the issue which we thought was still existing on August 14 related to depreciation on appliances on display and on loan. Will that adjustment be found in an exhibit which you will present?

Mr. McElfresh: Yes, that adjustment is recorded in our exhibit.

Mr. Harrison: But that is one of the items that was not corrected by the company until the case came on for prehearing?

Mr. McElfresh: That is right. There are several other items in that category that have been called to the attention of the Company that did not make material difference on the results because they were only misclassification in so far as the particular primary accounts were involved, and these errors in classifications were called to the attention of the Company and they have agreed to change their procedure in the future with regard to items of this nature, although we did not deem it of sufficient importance to have a transfer made from one primary account to
564 the other.

Mr. Harrison: Where corrections of that sort are made by the company, upon the matter being called to their

attention by the accounting department of the Commission, and the corrections are made accordingly, that matter itself would never be brought to the attention of the Commission or to anyone else, would it, except the company?

Mr. McElfresh: Not in the ordinary course of events.

Mr. Harrison: And therefore the issues left today are to practices or accounting errors, as they may be, in which the company would not agree to your interpretation of the classification of accounts or the appropriate items of account to be charged?

Mr. McElfresh: That is correct. Before we leave that subject I would like to call attention to one other item that has to do with the rate base in the amount of $25,497, covering the painting of a holder of the Prince Georges Gas Company.

This holder was not painted at the time it was completed and the contractor had a fixed price to complete this holder, including paint, and there was an amount of about $6,000 still due on the contract, but the original contractor did not paint the holder, and a separate contractor was
565 hired for the painting, and that cost of painting was $25,000.

Mr. Falk questioned the propriety of including that item in the rate base at this time, pending a determination of whether or not the contractor would be liable for the difference between the $6,000 still due on the contract and the $25,000 paid to the outside contractor.

Mr. Harrison: Has there been a disposition of that item?

Mr. McElfresh: That item is in suspense and not in the rate base at the present time.

Mr. Harrison: Will your exhibit show an adjustment for that item?

Mr. McElfresh: No, that was adjusted on the books.

Mr. Harrison: As a result of the investigations which you have detailed at some length, have you had prepared or has there been prepared under your supervision exhibits which will show the amount available for return and the net amount available for increase or decrease in rates, in accordance with the sliding scale arrangement?

Mr. McElfresh: Yes, I have prepared such an exhibit.

Mr. Harrison: We now offer that exhibit, Mr. Chairman, as Exhibit No. 1.

I might add it consists of six schedules.

566 (The document referred to was received in evidence as Commission's Exhibit No. 1.)

Mr. Harrison: I would like to make this statement for the benefit of those who get certain copies.

Mr. McElfresh will call attention to the entry.

I offer the original copy of this for the record, in lieu of this one, and call attention to the fact that the copies being distributed do not have the last entry in the amount of $1,592.25, being a carry-over item from the 1940 rate case, which Mr. McElfresh will explain.

Mr. McElfresh: This $1,592.25 was the amount available for decrease of rates found by the Commission in its order 1921 on the 1940 rate case and was ordered by the Commission to be held available for future rate reductions.

Since there was no rate reduction under the sliding scale arrangement of last year, that is, the year 1941, this item is still available for decrease of rates, so we have used it here to reduce the deficiency in return which is available this year for an increase in rates.

The deduction of this item from the last figures shown on Schedule 1 of $326,310.31 produces an adjusted amount available for rate increase of $324,718.06.

Mr. Harrison: Before you start further explana-
567 tion of Exhibit 1, Mr. McElfresh, I shall ask you whether or not the schedules in Exhibit No. 1 are made in the light of and in accordance with the sliding scale plan as you understand it?

Mr. McElfresh: That is correct.

Mr. Harrison: Will you explain Exhibit 1 in such manner as you may think appropriate, bearing in mind, of course, that we have already offered a stipulation as to the facts except in regard to the items in dispute.

Mr. McElfresh: Well, briefly, Schedule 2 shows the development of the rate base starting with the unweighted

rate base found as of July 1, 1941, and adding to that the weighted net additions during the test year.

There are also a couple of adjustments there, elimination of contribution in aid of construction during test year, and deposits for main extensions.

There was also included in this rate base each working capital, materials and supplies, determined in accordance with the provisions of the sliding scale arrangement. The rate base amounts to $28,088,331.57.

Schedule 3 covers the operating revenues of the company, both from the sale of gas and from other sources, after adjustments, one of which was a controversial issue
568 originally that has been conceded by the company, and amounts to $8,918,656.27.

Schedule 4, the adjusted operating expenses of the company, the first column shows the expense broken down by major groups and reflects the amounts reported on the books as operating expenses, retirement expense and taxes.

The second column covers the accounting adjustments in the amount of $251,790.19.

The third column is the net of the first two, and the fourth is the portion of the operating expenses after adjustment allocated to service outside the District of Columbia.

The final column totals $7,417,941.76, and is the adjusted operating expense of the company applicable to gas service in the District.

Schedule 5 consists of four sheets and gives the detail of the accounting adjustments that have been made and that are reflected in Column 2 on Schedule 4.

Mr. Harrison: Those adjustments will be found involved in the controversial issues?

Mr. McElfresh: Yes, they will include those items in controversy as well as other items conceded by the company.

I might add that the first item on Schedule 5 relates
569 to the adjustment of miscellaneous operating revenues on Schedule 3.

Mr. Harrison: If that completes your statement of Exhibit No. 1, then—

Mr. McElfresh: (interposing) There is a further schedule, Schedule 6, which is the comparative statements taken directly from the books of the company without adjustment or allocation.

This schedule shows cost per MCF operating expense applicable to gas service, and I think the revenues are broken down by MCF figures.

. . . . . .

580 *Cross-examination.*

Mr. Prettyman: How many years have you been accountant on the Public Utilities Commission staff?

Mr. McElfresh: I came with the Commission September 1, 1936.

Mr. Prettyman: And has the Commission's staff made examinations of the accounts of this company during each of the years since you came with the staff similar to the one you have described as having been made this year?

Mr. McElfresh: During the year 1936 I cannot answer that, but since that year, yes. I, myself, was engaged in the examination for the years 1937, 1938, and 1939. In 1940 I was made Chief Accountant.

Mr. Prettyman: And you have supervised that examination in 1940, 1941, and this year?

Mr. McElfresh: That is right, sir.

Mr. Prettyman: As I understand it your Exhibit 1 gives the figures assuming that all the issues in dispute,
581 as specified by the conferees, were decided against the contention of the company?

Mr. McElfresh: That is right.

Mr. Prettyman: Have you seen the reconciliation that I believe was prepared by Mr. Ritenour of the Gas Company, in which he reconciles the figures in your exhibit with the figures that would result if the various points in dispute were decided in favor of the company's contentions?

That was a pretty long question, but I am asking whether you have seen that reconciliation.

Mr. McElfresh: Yes, I have a copy of it here before me.

Mr. Prettyman: Have you had a chance to see whether it is correct?

Mr. McElfresh: I think this statement reflects the differences in our exhibit and the company's.

Mr. Prettyman: Will you identify the exhibit which I hand you now as a copy of that reconciliation?

Mr. McElfresh: Yes, it is.

Mr. Prettyman: Will that be marked Exhibit 2?

(Exhibit No. 2, marked for identification.)

Mr. Boothe: I assume, Mr. Prettyman, you will have a witness who can sponsor the exhibit if I should decide
582 to ask him some questions about it.

Mr. Prettyman: Oh, yes. I didn't intend to put him on the stand, but he is here if you want to ask any questions.

Just one other matter, Mr. McElfresh. You spoke about the pyramiding effect of allowing a deduction for excess profits tax in computing the rates for next year, and you stated, I believe, that that practice would cause more revenues and more excess profits tax, and so on, in the pyramid. That would not be true if the increased rates did not bring the net income of the company up to the amount of the excess profits credit, would it?

Mr. McElfresh: No, it would not. That statement was based on the assumption of a static condition if there was excess profits revenue.

Mr. Prettyman: But if the increased income resulting from increased rates still didn't bring the company up to the excess profits credit, under the act, in effect we would not have the pyramiding effect you have mentioned?

Mr. McElfresh: No, you would not.

Mr. Prettyman: I have no further questions.

Mr. Harrison: I don't know whether the Commission would like to have in this record by reference the

583 record made—just now I don't have the formal case number—but in so far as it might affect the matter of the promotion of use of gas the Commission might find it helpful to have the statistical information in the record relating to the authorization to increase the capital stock of the Washington Gas Light Company, as well as the sale of the $5 preferred stock which was recently authorized.

I am willing to offer that those records be incorporated hereby references, if the Commission—

Chairman Hankin: What is the significance?

Mr. Harrison: They just might have some information that the company might wish to review or think of in connection with certain issues that have been raised, outside of the issues raised by the conferees.

I merely make the offer, and if the Commission thinks it is not helpful then I will withdraw the offer.

Chairman Hankin: Have you in mind specific facts stated in those documents?

Mr. Harrison: I have in mind this, that I believe in those records there will be shown a statement of the construction program of the company over the last three years. I think that was involved in the $4.25 stock issue.

584 I also have in mind what I think is in that record, the volume of sales, increase in sales of gas, over the recent years as well as the regular income in balance sheet statements.

Chairman Hankin: If Mr. Flanagan would like to have that can you get it?

Mr. Harrison: Do you have any objection?

Mr. Prettyman: I have no objection to it. I suggest we assign the exhibit numbers by reference.

Mr. Harrison: I guess that can be done. It is part of the Commission's files. I don't have the formal case number, but it is the two cases involving the authorization of increases in capital stock whereby the Commission authorized the company to increase its capital stock by $4.25 shares and the authorization to issue and sell $5 preferred.

Mr. Prettyman: Can we just agree that those are incorporated by reference as Exhibit 3?

Mr. Harrison: That is agreeable.

Mr. Prettyman: That gives us some easy way of referring to it.

(The material referred to was incorporated by reference in the record as Exhibit 3.)

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Mr. Boothe: I would rather defer my major cross examination of the witness, as I intend to develop cer-
585 tain facts from him, until I see what the course of the case is going to be.

However, I would like to ask Mr. McElfresh just several questions at this time.

586 Referring to your Exhibit 1, Schedule 1, Mr. McElfresh, will you state what rate of return the company would earn if the deficiency in return shown on that exhibit is authorized by this Commission.

Mr. Prettyman: I don't understand the question.

The Witness: I take it you mean predicated on the net income available here as shown on the exhibit.

Mr. Boothe: Yes, predicated on Schedule 1, Exhibit 1.

Mr. McElfresh: I don't have that exact figure. I did make a computation on the basis of the exhibit prepared for the pre-hearing conference, Mr. Boothe, and on that basis the return earned would be 6.27 per cent.

That was based on a deficit of 323,000 against 324,000 shown on this exhibit, so the difference in the rate of return would be negligible.

Mr. Boothe: That would be the return earned after all operating expenses and all income taxes except the elimination of excess profits tax.

Mr. McElfresh: That is right.

Mr. Boothe: Which you have provided for.

Mr. McElfresh: Yes

Mr. Boothe: You are not expressing an opinion, by
587 the presentation of these statistics, are you, Mr. McElfresh, that a company rendering gas service in

the City of Washington, D. C., in 1942, when the country is in the war and economic conditions have changed as they have changed in recent years, is entitled to a return of that character.

Mr. McElfresh: No.

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591 Mr. Booth: I would like to defer further examination of the witness until I have had an opportunity to study his exhibit.

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Mr. Prettyman: In order to clear the matter up while we are on the subject, may I ask Mr. McElfresh
606 whether or not in his rate base, the original rate base figure was carried in at cost, that is the additions and betterments?

Chairman Hankin: That does not apply to the original figure that he started out with.

Mr. McElfresh: It applies to net additions since the establishment of the $21,000,000 rate base.

607 Chairman Hankin: And the $21,000,000 rate base includes the original cost of all properties except land which is put in at its appraised valne.

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PROCEEDINGS.

613 Chairman Hankin: The hearing will come to order. The Commission has considered the motion made by counsel for the Washington Gas Light Company to strike the first question raised by the Chairman yesterday, namely, with reference to the $1,055,000 of land value included in the rate base. The decision of the Commission will be announced by Commissioner Flanagan.

Vice-Chairman Flanagan: The question referred to appears on page 15 of the record of yesterday's proceeding and reads as follows:

"In the rate base of July 1, 1941, excluding working capital, there is included an item of $1,055,549.52, representing the difference between the appraised value as of June 30,

1933, and the original cost. All other items representing plant account are substantially the book value and are treated as the original cost in the proposed reclassification under the uniform system of accounts.

"Query: Should the $1,055,549.52 be retained as part of the rate base".

As the Chairman has stated, the Commission met in executive session this morning and Commissioner Kutz
614 and I have ruled that the motion be granted on the ground that the question raised is beyond the scope of the present hearing.

Chairman Hankin: I wish to note my dissent from the ruling of the Commission for the following reasons:

This is a hearing in accordance with the sliding scale plan to determine what should be the rates chargeable to the consumers for the coming year. Whether we decide on this particular question one way or the other, the result will affect the rates which are paid by consumers under the sliding scale plan. Therefore, the question must of necessity be part of this hearing.

The question has been raised, subsidiary to the one I stated, whether in view of the fact that the Commission in 1935 set the rate base at $21,000,000, it is proper in this proceeding to re-examine that rate base in order to have the present rate determined upon a proper base. It has been suggested that a reconsideration of the base rate would not be in accord with the sliding scale plan. I cannot agree with that view. The Commission very carefully stated the limits of its powers with reference to the establishment of, or, rather, I should say, the acceptance of a plan like the one we have before us. The Commission carefully noted
615 that an administrative body such as the Public Utilities Commission cannot vest or divest itself of jurisdiction. The statute imposes upon us the duty at all times to establish and maintain reasonable rates, and of course we cannot in one year fetter the Commission for future years.

Furthermore, the Commission carefully stated in the sliding scale plan, that to endure it must be susceptible of such modifications, both as to substance and form, as the facts or conditions from time to time may require.

The facts and conditions do require an examination of this rate base. First of all, in the hearing which was held prior to the adoption of the sliding scale plan, the amount of $21,000,000 was accepted on the theory that that represented the actual value of the property or book cost of the property. There has been some compromise, perhaps, as to what should or should not be the rate base. Since then, namely, within the test year, a study has been made, a reclassification of accounts in accordance with the uniform system of accounts, and at this time it is known to the Commission that the accounts of the company reflect what one might call an inflation of $1,055,000 over the actual legitimate original cost.

There is another reason why it is proper for the
616 Commission at this time to go into the question of whether this rate base is proper or not. In years past, and even up to 1935 when this rate base was established, there has been the impression of commissions all over the country, including this Commission, that it was necessary, that it was constitutionally necessary to establish a rate base reflecting what is known as the present value of the property, no matter what was the original cost. There was some language in the opinions of the Supreme Court which indicated that that was a necessary thing to do, and so the Commissions have proceeded on that theory on the ground that that was required by the highest authority on questions of Federal law.

Since then the Supreme Court has definitely indicated that it does not make that requirement of a state commission or of a commission like this one in the District of Columbia. While in the case which the Supreme Court decided it was not necessary to decide and therefore the Court did not decide that the actual legitimate original cost must be

the rate base, this much is clear, that under the latest decisions of the Supreme Court, a commission is not obliged to follow what it had thought was the law of the land, namely,
that the present value rather than the original cost
617 should be taken as the rate base.

I think in view of those things we should go into this question.

It has also been suggested that in order to go into this question it would be necessary to have a protracted hearing. I do not agree that is so. The books of the company have always reflected the original cost of the land properties. If that had been an error on the part of the company, then such an error might have been subject to correction in the reclassification of accounts, but that was not an error. It is quite proper and proper accounting practice to include the original cost of property in the accounts and there is very good reason why the company should, for, by including the original cost of the property it does not lay itself open to taxation on the basis of present-day values.

Since this is not an error in the accounting, it is not permissible for the company to revamp its accounts rather than reclassify its accounts under a uniform system of accounts, and therefore there is no need for taking proctracted evidence on the theory that some of the parcels of land—of which in fact there are only two, one having been exchanged
in 1917 and the other in 1921—that on account of
618. these two parcels of land it was necessary to go into
extensive testimony in order to determine the value of the properties which had been exchanged.

For these reasons I note my dissent and shall include the authorities in support of it in my dissenting opinion.

Mr. Prettyman, have you any testimony?

Mr. Prettyman: Swear Mr. Maloney.

Chairman Hankin: Mr. Boothe, did you have something you wanted to say?

Mr. Boothe: I take it if the Commission please, the ruling on this question is not to be considered as a ruling by

the Commission but we will not be permitted to present to the Commission the effect of the Government's war program to stabilize prices to prevent further increase in the cost of living, and the relationship between those factors upon the application of the sliding scale arrangement in this proceeding. The thing that occurs to me at this point is whether or not the Commission's ruling is to be construed as limiting the issues in this case to the sliding scale arrangement.

Vice-Chairman Flanagan: No indeed. As I construe the ruling, we have made, it pertains to the motion made
619 by counsel for the company and that motion alone. Is my statement clear to you, Mr. Boothe?

Mr. Boothe: Yes.

Mr. Stevens: Are you ready for us to proceed?

Chairman Hankin: Yes.

A. J. Maloney

called as a witness on behalf the Washington Gas Light Company, having been first duly sworn, was examined and testified as follows:

. . . . . .

651 Cross-examination

. . . . . .

665 Mr. Boothe: I would like at a later time to go into more detail on the effect of those regulations and restrictions upon your business today, and the expenses incurred by your business today as contrasted with a year ago.

Mr. Maloney: I would be delighted to, sir, at your convenience.

Mr. Boothe: That is all at this time.

666 Chairman Hankin: In other words, you want to reserve further examination of this witness?

Mr. Boothe: Yes.

Chairman Hankin: All right, Mr. Prettyman.

Mr. Prettyman: I have no further questions. Have you?
Mr. Stevens: No, no further questions.

(Witness excused.)

Mr. Prettyman: Will you swear Mr. Ritenour?

O. H. Ritenour

called as a witness on behalf of the Washington Gas Light Company, being first duly sworn, testified as follows:

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669 Cross-examination

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677 Chairman Hankin: Mr. Boothe, have you any questions?
Mr. Boothe: Not at this time.

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687 Chairman Hankin: Mr. Boothe, do you have any questions to ask at this time?
Mr. Boothe: No, not at this time.

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Everett J. Boothby

688 called as a witness on behalf of the Washington Gas Light Company, having been first duly sworn, was examined and testified as follows:

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701 Mr. Prettyman: I have no further questions.
Mr. Harrison: I have no questions.
Mr. Booth: I have none at this time.
Chairman Hankin: All right. Thank you.

(Witness excused.)

Mr. Prettyman: Will you swear Mr. Owers.

Robert C. Owers

called as a witness on behalf of the Washington Gas Light Company, having been first duly sworn, testified as follows:

* * * * * * * * * *

725 Chairman Hankin: Mr. Booth?

Mr. Booth: I would like to reserve cross-examination of the witness, and I will have some questions of the witness.

Does this conclude your direct case, or your testimony?

Mr. Prettyman: It concludes the testimony so far as the computation under the sliding scale itself is concerned.

Mr. Booth: I have stated to the Commission that I want a reasonable amount of time to determine the extent of the testimony we would want to present, and also the extent of the cross-examination I may want to conduct of the witnesses who have presented their testimony.

If this concludes the presentation of the testimony by the Company—

Mr. Prettyman: We have one more witness in regard to the schedule of rates, but this is the end of the testimony so far as the computation is concerned.

Mr. Booth: I would like to reserve cross-exam-
726 ination of the witness.

Chairman Hankin: Mr. Booth, you say you would like to have a reasonable time in which to prepare for the cross-examination of these witnesses, and to introduce your own evidence. How much time would you want?

Mr. Prettyman: Your Honor understands we have one more witness in regard to the schedule of rates before we conclude our part.

Chairman Hankin: We can wait.

Mr. Prettyman: It is all right to determine this now. The testimony we have to present is very brief.

Chairman Hankin: Perhaps you better present that other testimony since the cross-examination is reserved.

(Witness excused.)

Mr. Prettyman: Before we go further I would like to offer in evidence Exhibit 2. Yesterday it was identified by Mr. McElfresh, but I failed to offer it, so I will offer it in evidence as Exhibit 2, identified by Mr. McElfresh.

Chairman Hankin: Admitted.

(Washington Gas Light Company Exhibit No. 2, witness McElfresh, admitted in evidence.)

727 Mr. Prettyman: On the record I should like to state in regard to that exhibit, it shows in one column the company computation which is $382,189, which is the amount available for the rate increase. It is five-sixths of the deficit in the basic term.

The figure of the Commission's staff, shown in the next column, is $326,310 as the amount available for rate increase. The excess is shown in the last column by detailed figures.

Will you swear Mr. Mason?

Mr. Harrison: If the Commission please, I want to call Mr. Prettyman's attention to the fact that Exhibit 2 was prepared before the last entry on Exhibit 1 was made for the carryover amount from the year 1940, which would make a slight difference in the amount available for rate increase as now shown on Exhibit 2.

Mr. Prettyman: Mr. Harrison, you have reference, I think, to your statement yesterday that the figure of $1,592.25 should be deducted from that final figure of $326,310 shown in the column headed PUC Accountants on Exhibit 2.

Is that the item to which you have reference?

Mr. Harrison: Yes, that is the item. You show it in round figures.

728 Mr. Prettyman: I would say the same adjustment should be made in the first column in the Company's figures. In other words, we concede that item would carry over.

Chairman Hankin: We will take a short recess.

(A short recess was here taken.)

729 Chairman Hankin: Mr. Prettyman?

Mr. Prettyman: Swear Mr. Mason:

Stephen S. Mason

was called as a witness on behalf of the Washington Gas Light Company and being first duly sworn and examined testified as follows:

. . . . . .

750 Chairman Hankin: Do you have any questions to ask, Mr. Booth?

Mr. Booth: No, I would like to reserve cross examination of the witness.

Mr. Prettyman: That completes our case, your Honor.

Chairman Hankin: Mr. Booth, you stated you wanted to make a motion.

Mr. Prettyman: May I say in regard to adjournment of the hearing for the purposes of Mr. Booth's cross
751 examination, we want to point out, if your Honor please, that these rates are supposed to go into effect on September 1st, and this order for the hearing was issued last March and the date for the hearing was set some time ago, and the normal operation of the sliding scale arrangement has been known here for a long time. This hearing takes place every year, and we would certainly oppose any extended recess or extended postponement. We think this case is complete and that the order should go into effect.

Chairman Hankin: I have also reserved my questions until after counsel have examined the witnesses.

. . . . . .

759 Mr. Booth: Apparently I did not make myself clear. I said I would like to have an opportunity to have such testimony prepared. I thought I made that clear. That was what I intended to say. Obviously, I could not have any such testimony ready because I did not seek the Commission's permission to intervene in this case until yesterday morning, and the decision to file the petition was not reached until the evening before.

760 I would like to ask Mr. Prettyman one question—perhaps I am wrong—perhaps Mr. McElfresh can answer. Is it true that the computation of Federal income

taxes for the year ended June 30, 1942, for the period January 1 to June 30, 1942, are predicated upon the rate which was in force in 1941 or upon an estimated higher rate, which the people who drew up those figures assumed that Congress would enact in 1942.

Mr. Prettyman: Mr. McElfresh probably knows the answer. The difference including excess profits tax is something like $70,000.

Mr. McElfresh: The income tax rate used in developing the figures on Exhibit No. 1 was 40 per cent for the first six months of 1942, and under Section 6 that same rate has to be applied to the taxable income for the last six months of 1941. So that in effect income taxes for the test year ended June 30, 1942, are computed on the basis of 40 per cent.

Mr. Prettyman: Under the present bill for Congress it would be 45 per cent, would it not?

Mr. McElfresh: I think that is true.

Mr. Booth: Is it true, Mr. McElfresh, that the tax rate under the Revenue Act of 1941 is substantially lower
761 than the 40 per cent calculation used in the test year income and expenses for the year ended 1942.

762 Mr. McElfresh: Yes.

Mr. Prettyman: 41 per cent for the first half of the test year and 41 for the second half. The pending bill before Congress puts the rate at 45 per cent. There is no provision for any further increase.

* * * * * * * * *

766 Vice Chairman Flanagan: Mr. Booth, you have been stressing throughout the interest of the OPA in the effect of income taxes. Did you raise any other issue in the Bangor case—I think that is the one you were referring to?

Mr. Booth: In the Maine case we filed an intervening petition which may have been predicated largely upon the tax issue; nevertheless we asked leave to intervene and I think had the case gone to hearing instead of the Company withdrawing its request for an increase, having intervened I would have taken the position I am taking here, namely, that what we want to do is to review the request for an in-

crease in the light of the basic problems that are raised by the Government's program to keep down the costs and prices.

Vice Chairman Flanagan: What is the attitude of OPA when it finds that the request for an increase is necessitated
767 in large part by increased labor costs and costs of materials?

Mr. Booth: I do not know, but I do know this, that supposedly an inquiry is made of the over-all earnings of the Company before income taxes, not after income taxes, to determine whether or not any hardship would be imposed upon the Company by absorbing increased costs. I do not know whether that rule is applied in every case, but that is the basis for an exception or an adjustment under the general maximum price regulations, namely, whether or not a substantial hardship would be imposed by not making the adjustment sought for, and that is the reason I would like to have more time to review the Company's operations as a whole, to see whether or not any substantial hardship would be imposed upon the Company by not making the increase.

Of course it is the Commission's function to determine that, but by intervening here and asking that the sliding scale arrangement be reviewed in the light of current economic conditions and the problems of the National Government in keeping prices down, we would like a reasonable opportunity to determine just how far we want to go.

Vice Chairman Flanagan: The Commission's action this morning in disposing of the question with respect to
768 the component parts of the sliding scale arrangement, I suppose, can be taken as indication that the sliding scale arrangement itself is not a part of the proceeding. That raises the question in my mind as to whether an intervener should be given the right to analyze for this record the sliding scale arrangement itself.

Now, as to the effect upon the Company's operations for the past year caused by increased operating expenses, ex-

cluding taxes, that is a simple calculation. You do not expect, I take it, to cross-examine to the same extent that this Commission is obligated to cross-examine the entire set-up of operating expenses of the Company—or perhaps you do. I would like to have you so state if you do; but if the main interest of the OPA concerns itself with income taxes, necessarily you would not need a great deal of time to prepare on that question so far as this Company is concerned, would you?

Mr. Booth: I do not think I said that was the only issue. What I wanted was some time to review the record to determine how far we wanted to go.

Vice Chairman Flanagan: Well, the record itself is not very voluminous, and that would not take long.

Mr. Booth: That is right, except, Mr. Commis-
769 sioner, included in the record are the records in a couple of other cases.

Mr. Prettyman: Only a part of them, which I understand is only a matter of five or six pages, and that would not help you in the cross-examination on the issues in this case.

Vice Chairman Flanagan: They consist principally of financial statements in support of an application for refinancing.

Mr. Booth: They probably have some data on the overall financing history of the Company and its growth and its income in the last few years.

Mr, Prettyman: I would like to put a reference to one more case in the record. Mr. Booth referred to a couple of cases in which OPA intervened. There is a reference to a case in the current release before the Indiana Commission. The Commission at any rate discusses the contention of OPA in the rate proceeding and says the question is not increased prices which OPA is interested in, but the determination of a utility rate and that OPA had nothing to do with the proceeding at all.

Mr. Booth: That is not what the Indiana Commission said at all, Mr. Prettyman.

Mr. Prettyman: I would like to supply the exact citation.

770 Vice Chairman Flanagan: What is the citation?

Mr. Prettyman: I think it is the Greencastle case.

Mr. Harrison: There is a reference to that case in the National Association of Utility Commissioners' Bulletin 126, 1942, dated August 15, 1942, which the Commission does have.

Vice Chairman Flanagan: We are not a subscriber to that. What is the case?

Mr. Harrison: It is the Greenfield Gas Company, Inc., and these are leaflets or bulletins sent out by the Association to Utility Commissions.

Chairman Hankin: What did happen in that case, Mr. Booth?

Mr. Booth: I read the quotation. The Commission said that OPA was interested in scrutinizing requests for rate increases before the various commissions to determine whether or not there was any conflict with its program. The Commission said it was very much in sympathy with the national program but said the individual case was an exception and the company was entitled to a rate increase. We did not appear or participate in any way before the Indiana Commission in that case or in any other case.

Mr. Prettyman: The Indiana Commission granted the increase in that case.

771 Mr. Keane: May I make a statement on behalf of the District of Columbia Gas Workers Union?

Chairman Hankin: Yes.

Mr. Keane: Mr. Flanagan raised the question about the three hundred and some thousand dollars in wages. I would like the Commission to know that the one competitor of the Gas Company in Washington is the Potomac Electric Power Company, and that as contrasted to the $169 average wage for employees of the Gas Company, the employees of the Potomac Electric Power Company receive an average wage of $202 per month, and that we negotiated for a period of

about six weeks—and I might say that I am not here at the request or on behalf of the Company, I can assure you. There are some 1200 people in that union. We did our utmost to secure a raise and we did secure one based on another type of sliding scale, that is, the cost index of living, which, as Mr. Prettyman stated, meant roughly a 16 per cent increase in wages, or about $380,000.

Now, my point is this. I know it is always the public who pays in the long run; there is no question about that, but on the other hand there is no reason why the employees of the Gas Company should suffer, either.

772 My opinion of the OPA's function is to fix prices, wages, and ceilings at prevailing scales. You have the Gas Company here in a situation where there return is so limited that they are not able, and you have all of the facts and figures before you, to pay a wage scale comparable to that of the Potomac Electric Power Company. It would be absolutely beyond the realm of possibility. Further than that, matters have been taken before the Board to do away with the welfare, which is certainly an emolument for compensation to the men, the same as their regular compensation. I would certainly like the Commission to go into those facts and think them over when they decide this case.

Chairman Hankin: How would the interest of the employees suffer if we gave OPA reasonable time in which to prepare this case?

Mr. Keane: I do not know what a reasonable time is. I do know this—

Chairman Hankin: Let us suppose we gave the OPA four weeks time in which to prepare their case; how would the interest of the employees suffer?

Mr. Keane: They would suffer to this extent: The longer the effective date is postponed, there is that

773 much less income to the Company, and the employees here are in a situation where they are bound and limited by the income of the Company.

Chairman Hankin: Is your wage computed upon the income of the Company?

Mr. Keane: No, but if you go to a man and say "I want a raise", and he says "I cannot give you any because I am not making any money", you are not going to get it, but if he is making money the chances are you will get the raise.

Chairman Hankin: You are afraid if the OPA prepares its case well, the Company might lose the money?

Mr. Keane: I am not. I see no point—

Chairman Hankins: Then I do not see how your interests would be affected.

Mr. Keane: I was not arguing on the ground of continuing. Mr. Flanagan made a remark about the $380,000 in wages and I did want the Commission to compare the two utilities on the question of wages. I also mentioned the pension and welfare benefits, which are certainly emoluments. As far as the continuance is concerned, that is none of my business.

Vice Chairman Flanagan: I did not pick out labor increase specifically; I mentioned others, exclusive of taxes.

Mr. Keane: But labor was some $380,000; I be-
774 lieve it was more than the rate increase.

Vice Chairman Flanagan: Yes.

(At this point the Commission went into executive session.)

Chairman Hankin: The Commission has considered the request made by counsel for the Office of Price Administration and has decided to grant a continuance of two weeks, and thereafter the case will be called at the pleasure of the Chairman.

Mr. Booth: For two weeks?

Chairman Hankin: Yes, and then the Chairman will determine when to call the hearing.

Mr. Booth: No specific date is set?

Chairman Hankin: No. In other words, counsel will have to be prepared two weeks from now if the Chairman calls the hearing fourteen or fifteen or sixteen days from now; that is up to him; but counsel will have to be prepared within two weeks from today.

Vice Chairman Flanagan: I think it might also be understood that if the Commissioners feel they are ready and you find you are ready before that date, we can call it before the two weeks have expired.

775 Chairman Hankin: In other words, notify the Chairman when you are prepared and then the Chairman will call the hearing.

Mr. Booth: That is agreeable.

Chairman Hankin: The hearing will now be adjourned.

. . . . . .

779 Chairman Flanagan: The hearing will come to order.

Mr. Harrison: If the Commission please, this hearing was adjourned on August 19th, on motion of Mr. Booth, for the purpose of permitting him time for cross examination and presentation of such testimony as he desired to offer. I presume Mr. Booth is ready to proceed this morning with the cross examination?

Chairman Flanagan: Will you proceed, Mr. Booth?

Mr. Booth: Yes, I am ready to proceed. We will call Mr. Owers.

Mr. Prettyman: We do not have anything more to present at this time.

Mr. Booth: I indicated I would be ready today, yes.

Robert C. Owers

called as a witness on behalf of the Washington Gas Light Company, having been previously duly sworn, testified as follows:

Cross Examination

Mr. Booth: Will you state your name, Mr. Owers, please, for the record?

. . . . . .

830 Mr. Stevens: This whole line of questioning is objectionable, Mr. Chairman, because this company is

following the sliding scale and the income taxes are deductible under the sliding scale. The sliding scale states that very clearly.

Mr. Booth: Will you refer me to any provision of the sliding scale arrangement which says that Federal income taxes—

Mr. Stevens: All taxes.

Mr. Booth: What does it say?

Mr. Stevens: Reasonable accrual for taxes. Here it is, page 6 of Order No. 1458.

Mr. Booth: Are you suggesting that that provision intended to impose upon this Commission the obligation without any qualification whatsoever as to whether or not the rates should be increased because the Government should levy higher taxes upon the company and other companies during war time?

Chairman Flanagan: Mr. Booth, just a moment please. I do not think this is the appropriate time for an argument of counsel. With respect to Mr. Steven's remark that the entire line of questioning is objectionable, I cannot agree with that because the O. P. A. was permitted to intervene and one of the main points of their plea for intervention was their desire to go into the question of income taxes.

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. . . . . .

849 Chairman Flanagan: Mr. Booth, I am wondering where all of these questions are leading us. If we attempt at this time to review every transaction that was consummated in prior years—

Mr. Booth: I am not suggesting that.

Chairman Flanagan: It seems we may be getting away from the problem presently before us. If you can get to your point without a review of the operation of the sliding scale arrangement in prior years, I would like to have you do it.

Mr. Booth: Perhaps I ought to tell you the point here and attempt to demonstrate—

Chairman Flanagan: It may be a good idea.

Mr. Booth: The position we expect to take is that the fair measure of the income taxes of the Company for
850 purposes of this rate proceeding would be what the Company was subjected to for income tax purposes in normal years. Now, one measure of that would be the average income tax which was allowed or included as operating expense and properly so between the years 1936 to 1939. That, after all, if the Chairman please, is the base, I believe, upon which normal income taxes are computed under the Revenue Act, and it is only because of that reason, as well as to clear up this tax problem which as we have indicated we have a special interest in, that I find it necessary to go into this question in some detail. It is complicated because apparently the Company did not pay an income tax in 1938 and it was allowed a substantial sum and certain adjustments which are not clear were made in 1939 and 1940.

Chairman Flanagan: What are you primarily interested in? Is it the amount of income tax paid for the calendar year in each of these years or the effect upon the computations under the sliding scale arrangement of including a different amount for income tax purposes?

Mr. Booth: I would say we are interested in knowing what the Company's normal income taxes are and which are allowed and have been allowed for rate-making pur-
851 poses. Yet if it is a fact that income taxes were allowed as an operating expense even though subsequently the Company paid no income taxes—I am not saying that is true because it is not clear from the figures what the situation is—that would be an additional factor which would bear upon the allowance of the claim of the Company for income tax for purposes of this hearing.

Chairman Flanagan: It is obvious that there can be no true comparison between the amount of tax paid for a calendar year and the amount of tax computed for a test year because there was an overlapping included in the test year calculation.

Mr. Booth: But Mr. Owers has stated that an adjustment was made in 1939 and 1940 of whatever it was—maybe Mr. McElfresh can state it more accurately—because income taxes were allowed in the amount of $154,000 for rate-making purposes in 1938 even though subsequently no payment of income taxes was made.

Chairman Flanagan: That may be true and it may require an involved explanation, because as I understand it for the test year ending June 30, 1938, the amount calculated for income taxes would comprise the actual taxes paid for six months and the accrued taxes for another six
852 months. So that is why I raised the question whether we are not getting into extended explanations which for purposes of comparison that you are trying to make may not be very useful. I do not want to preclude you from obtaining whatever information may be helpful to the case, but if you can get to the point a little more rapidly—we have spent most of the morning—and I am not saying this critically—without asking for something which has any direct bearing on the case.

Mr. Booth: I think it has a very definite bearing, Mr. Chairman. I think it is the basis of our intervening petition.

Chairman Flanagan: What is the bearing of the amounts involved in prior years' calculations under the sliding scale arrangement or the explanation of any differences which might have occurred betwen actual taxes paid for a calendar year and taxes used in the calculation under the arrangement? That is the point that puzzles me. If you can clarify it, I will be glad to have you do so.

Vice Chairman Hankin: I wonder if I may ask a question which perhaps will throw some light on the question asked by the Chairman. As I take it, the sliding scale arrangement prescribes that there be allowed reasonable accruals for taxes. Reasonable accruals for taxes does not
853 necessarily mean all of the taxes that are paid, but all of the taxes that accrue if the books are kept on

the accrual basis. Do you keep your books on a cash receipts basis or accrual basis?

Mr. Owers: Accrual basis.

Vice Chairman Hankin: And that is the reason for reasonable accruals for taxes. I take it your view is that reasonable accruals for taxes would be normal taxes, and I notice that for the years 1936, 1937, 1938 and 1939 we had what one might call normal years. Then there was a sudden jump in 1940 and a further jump in 1941 and a still further one in 1942. There is something to account for those jumps in taxes, namely, that they are in fact war taxes, and the question then may arise as to whether the allowance of such taxes, at least the amounts over and above the normal taxes, would be a reasonable accrual for taxes to be allowed under the sliding scale plan.

Is that your point, Mr. Booth?

Mr. Booth: If the Commission please, I think there are two questions there; one, under the law as the courts have laid down in the determination of what are reasonable operating expenses for rate-making purposes, and in my judgment those principles govern the determination of operating expenses for purposes of the sliding scale arrangement

—the mere fact that the sliding scale arrangement
854 says that taxes shall be allowed does not mean all taxes, but such taxes as are proper according to the legal principles governing the inclusion of taxes as an operating expense. In my judgment the law has been pretty well settled, both as to taxes and other items of operating expenses, that only normal expenses are properly allowable for rate-making purposes and that abnormal expenses are excluded.

Mr. Stevens: Now—

Mr. Booth: Just a moment.

For that reason, under that legal principle, the abnormal Federal income taxes and excess profits taxes which the Company is now compelled to pay because the country is in a war and has been levying higher taxes in the last two

or three years, because of war expenditures, those are abnormal expenditures and should be eliminated in this case as well as in any rate case.

In the second place, the inclusion of the full amount of Federal taxes during the war is definitely inflationary and contrary, in our judgment, to the program of the National Government in asking for higher taxes, and it is exactly
855 contrary and in conflict with the program of our office and of the other Federal agencies which are attempting to stabilize commodity prices. Therefore in trying to determine within a reasonable degree of accuracy—I do not believe we can take the time to determine this down to the dollar—what would the Company's normal taxes be for purposes of this case, one measure might very well be the average of the amount allowed during the 1936 to 1939 period, or the average rate that prevailed during that period. But it is in an effort to get somewhat more exact information because Mr. Owers has said that the 1938 figure and the 1939 figure have been subject to adjustments, and apparently rather substantial and not minor ones, that I am trying to ascertain what represents more accurately the income taxes allowed for sliding scale arrangement purposes during those periods and how it was arrived at.

Chairman Flanagan: I presume you will be prepared to submit some evidence or documents explaining how you arrive at what in your estimation is a normal year and what is an abnormal year, to guide us in considering what is offered here?

Mr. Booth: We are planning to do so.

Chairman Flanagan: In the interest of expedition, without trying to rush you too fast, can we have an understanding as to the set-up, that is, taxes paid on a calendar
856 year basis, while they bear some relation to taxes calculated for rate-making purposes, are two separate and distinct figures, and that to attempt to compare an allowance for the test year ending June 30, 1938, let us say, is not a figure which is easily comparable with the taxes

paid for the calendar year 1938. Now, as to whether suitable adjustment was made under the arrangement in succeeding years is a matter for the Commission's records to disclose. I do not see where it has a great deal of bearing in the comparison which you are attempting to make.

Vice Chairman Hankin: Supplementing what—

Mr. Booth: I was just going to say, if the Chairman please, to clear my position, that I would be glad to agree to defer this point for the time being, subject to an effort to clear it up off the record by talking to the Commission's staff or examining what additional data might be necessary. If it appears that there is a reasonably substantial point there, then I will ask it be reopened.

Chairman Flanagan: That is agreeable; I think it will save time.

* * * * * * * * * *

878 Chairman Flanagan: There is one element you have brought out and that is reasonableness. I wish at some time in the progress of your cross-examination, or testimony of your witnesses, you might give a 879 little thought to the question of reasonableness. In other words, from the standpoint of the O. P. A. if no ceiling has been placed on certain types of expenses, does that mean by inference or otherwise that in the opinion of O. P. A. such expenses are reasonable? I have in mind costs of materials and labor costs on which no ceilings have been placed. I think it might guide us if we had some elaboration of the reasonableness aspect of the expenses which are entering into this present case.

Mr. Booth: I see the point and I am planning on direct testimony on the question as to the extent to which it would be appropriate in the light of the Government's program if a utility is to be allowed income tax as an operating expense, what is a reasonable measure of the allowance of income tax as an operating expense in war time, and some of our people are working on that problem and will have something ready, I understand, in a week or ten days.

If the Chairman please, I do not want to make this cross-examination of Mr. Owers any longer than necessary. The question as to whether or not the company is subject
880 to excess profits tax in 1942, with or without a late increase, happens to be a very important matter from our point of view. We have tried to the best of our ability to get from Mr .Owers the exact figures upon which he sponsored the statement in the stipulation that no excess profits tax would be paid by the company in 1942, and as he has indicated and as I have indicated, certain fundamental data which he used in arriving at that conclusion had not been made available to us—

Mr. Prettyman: I cannot let that statement go unchallenged, Mr. Booth, because I do not think it is an accurate statement.

Mr. Booth: He has not said it is fundamental, but it is clear it must be.

Mr. Prettyman: The statement of fact you have made is not accurate. You made a request for certain data and all factual data was furnished you. You asked for the budget estimate for 1942 and we declined to give you that. That was purely estimates made from time to time. Now Mr. Owers stated on the record this morning the facts and figures which directed his judgment there would be no excess profits tax in 1942. He stated it very clearly and carefully and gave you the figures. You tried in cross examination to make him say he used some other figures. He has
881 not used them. He stated at the beginning what he did. That is the state of the record at the moment.

. . . . . .

900 Chairman Flanagan: The question is open as to the date we reconvene.

Mr. Booth: I would suggest next Friday, if the Commission please. We are preparing some direct testimony. It is my hope, after an examination of the record and an opportunity to take up some of these disputed tax problems and computations with the Commission's staff and with the

company, we will be able to get enough facts to clear up this situation as to the excess profits tax liability of the company for 1942. We have no desire to delay the case for purposes of delay. We will try to do the best we can in this period. I want to say that in my judgment this proceeding involves some principles that are exceedingly important and we think we should be given, as I have indicated, a reasonable opportunity to demonstrate the
901 right of the company to an increase in the light of the effort of the Government, of which we all are a part, in trying to keep costs of living down and stabilize prices. I think if it goes over until next Friday we may be able, and at least we will make every effort to clear up the disputed points and get the additional facts into the record in short order.

Mr. Prettyman: If the Commission please, we protest very vigorously any such delay in this case. We have already had a delay of two and one-half weeks during which time Mr. Booth has had an opportunity to prepare whatever he might have to offer material to the issues of the case. The late order under the sliding scale is supposed to go into effect September 1st and that date has passed. The company reads meters daily and those bills ought to go out beginning the first part of next week.

So far as Mr. Booth's statement is concerned, he has not indicated he intends to present any contentions, and certainly no additional evidence that pertain to the issues in this case. If the issue he has in mind is whether the sliding scale should be specified, that is a totally different issue.

The hearing here is to compute the rates of this com-
902 pany under the sliding scale agreement. It seems to me the Commission has been more than generous in allowing him two and a half weeks to prepare. Most of the figures he has asked about today are in the possession of the Commission's staff, and it seems to use the hearing should go right straight forward. We are ready to go forward tomorrow and Monday morning, and we think in jus-

tice to everybody the hearing should go ahead to its normal conclusion.

Chairman Flanagan: Did you mean Monday morning?

Mr. Prettyman: I know it is Labor Day and a holiday, but this is important. The key thing in this whole proceeding is the effort of this company to finance its affairs. It was not able to finance in the spring. It has to finance. As to the O. P. A. and the policy of the Government, Congress did not put the policy in regard to public utility rates within the functions of the O. P. A.. The O. P. A. is here only by courtesy of this Commission. We did not feel it proper to object to the Government coming in, but as to the policy of that Office as to public utility rates, Congress saw fit not to give them jurisdiction over those rates; it is not within their policy, but the policy of this Commission.

If he has anything material to the issues, he has
903 already had two and a half weeks to prepare it, and we do think the Commission has been very generous in allowing him time to prepare and that the hearing should proceed in its normal course.

Mr. Booth: I want to say one thing. There is nothing about our presence here that indicates we have not recognized the jurisdiction of this agency to fix these rates. It is my position, and I expect to elaborate that, that Congress by the exemption of public utility rates from the Office of Price Administration intended that utility rates should be fixed in line with the national problems affecting price control during the war and merely because this company happens to have an arrangement entered into in 1935 does not mean in our judgment those rates can be fixed automatically without regard to the broader national aspects at this time.

904. Now, I think this financing situation is important. I think Mr. Owers, however, made the statement—I do not know it is important—in the earlier case that they did not contemplate a rate increase when they went ahead with their financing problem—

Mr. Owers: I did not make any such statement.

Mr. Prettyman: That is not an accurate statement, Mr. Booth. He stated in the beginning of this year when they proposed to finance—the beginning of last year they did not—but that financing did not go through. That is the key fact. We tried to finance in May and June and failed. Only half of the stock was sold. He testified on the stand if the rate increase went into effect we would be able to sell the stock and finance the company.

Chairman Flanagan: The testimony is in the record and we can consider it on the record.

The Commission would like to go into executive session for a moment to decide this question of adjournment.

(At this point the Commission went into executive session.)

. . . . . .

915 Chairman Flanagan: We will now adjourn until Tuesday morning at 10 o'clock.

. . . . . .

919 Chairman Flanagan: Are you ready to proceed, Mr. Booth?

Mr. Booth: We would like to recall Mr. Owers.

Robert C. Owers

recalled at a witness and, having been previously duly sworn, testified further as follows:

. . . . . .

934 Chairman Flanagan: Mr. Booth, I have prepared a little statement here which might put us all straight. I think that in the interest of all concerned there should be some understanding as to the status of the Office of Price Administration as an intervener in this proceeding. Perhaps this understanding should have been arrived at at the time the petition for leave to intervene was granted, but, as you will recall, this petition was filed at a late date, and the Commission waived its rule that such petitions should

be filed and served not less than five days prior to the date fixed for the formal hearing in a proceeding.

Rule 7.3 of the Commission's Tentative Rules of Practice and Procedure, adopted July 17, 1942, states that the Commission may grant or deny a petition for leave to intervene, or may grant the petition upon such conditions and limitations as it may prescribe.

Rule 7.5 states that the granting of a petition to intervene shall not have the effect of changing or enlarging
935 the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing on the question has been afforded all of the parties.

This Commission in effect has already ruled that questions pertaining to basic elements of the sliding scale arrangement described in Order No. 1458, dated December 13, 1935, are not within the scope of the present proceeding. This proceeding is vastly different from a proceeding involving a rate case as that term is generally understood. Rate cases usually involve a tremendous amount of investigatory work, detailed analyses, and a complete review of the operations of the utility involved, sometimes over a period of years. The question of the detailed valuation of property also must be determined in such a rate case. Here all that work was done before the existing sliding scale arrangement was entered into. In every year in which the arrangement has been in effect the staff of this Commission has spent months in making detailed audit of the company's operations. To question a basic element of the arrangement at this time would undoubtedly result in throwing open all other elements of the arrangement for reconsideration. This would obviously lead to protracted
936 negotiations, and the question as to whether another arrangement would be more advantageous or less advantageous to the consumer could not be settled within a period of months. It was not the intention of the Commis-

sion to initiate such proceedings when it called these hearings for the purpose of conducting its usual annual investigation of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company under the sliding scale arrangement.

This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding. However, we do not feel that the presentation of such views requires that the Office of Price Administration should carry on a detailed investigation into the accounts of the gas company. This has already been done by our staff, which is competent and experienced. It is the duty of this Commission to determine whether the accounting of the company has been performed in accordance with the terms of the sliding scale arrangement. We have the further duty
937 of determining that items entering into the computations made under that arrangement are reasonable.

In conclusion if it appears that the books of the company have been properly kept and that the necessary computations have been correctly made, the Commission will be faced with the question as to whether, in view of the national emergency, the rates and charges for gas service should be increased. It is expected that the Office of Price Administration, as intervener in these proceedings, will develop its testimony along lines which will assist us in arriving at a determination of this question at an early date.

Is that sufficiently clear, or does it need a little elaboration so that you may conduct your intervention with a view to getting before the Commission the present line of thinking of the Office of Price Administration?

Mr. Booth: If the Commission please, we presented our petition for intervention and to be a party to this proceed-

ing, and that petition was granted. The company did not object at that time to the intervening petition of the Office of Price Administration. It had an opportunity at that time to object. By permitting the Office of Price Administration to intervene, the Commission at that time, it
938 seems to me, authorized the Office of Price Administration to make a showing, and an accurate showing, as to whether or not the company should be entitled to a rate increase at this time, not merely in the light of the mathematical provisions of the sliding scale arrangement, but the sliding scale arrangement as construed in the light of the national program to stabilize the cost of living.

Now, we have also said that the question as to under what circumstances rates and charges for gas service should be increased is a national question. Of course, in a sense, we are all part of the national government; but the standard by which we believe we can aid the Commission in determining whether or not a rate increase should be granted is the standard which we apply, and that is the question as to whether or not in the light of all the circumstances which are pertinent to a determination, as to whether or not the company is entitled to an increase, as to whether or not there would be an undue hardship imposed upon the company as contrasted with the consumers, in determining whether or not the company should be entitled to higher rates and normal profits and the other issues in the case.

Now, we cannot determine whether or not a hard-
939 ship would be imposed upon the company without adequate facts. It has not been my intention to try this case as an ordinary rate case, but merely to attempt to develop sufficient facts relating to the more important issues in order that we might be in a position to tell the Commission whether or not under the standards which we think are applicable to this case, a rate increase is justified.

I understand the company is very anxious to push this case along to a conclusion. They have brought Mr. Stev-

ens from New York and apparently it is an inconvenience for him to be here—

Mr. Stevens: Now, just a moment. There is nothing in the record to that effect. Would you like to withdraw that statement?

Mr. Booth: If you will tell me it is not an inconvenience for you to be here, I will withdraw that statement.

Mr. Stevens: That is not the fact.

Mr. Booth: I had not intended to prolong the case. I had hoped to examine the witnesses today; I had hoped to conclude my examination before the end of the day, and I had also hoped to have a reasonable opportunity to present to the Commission such relevant facts bearing upon the
940 application of the O. P. A. program and have the facts presented in this case within a short time. I had hoped to be ready, if not by Monday or Tuesday of next week, to be ready on Friday. But it seems to me the Commission and the company are overlooking the fact that in any determination of rates the Commission cannot be governed by the mere mathematical formulas contained in the sliding scale arrangement, but that that must be applied in the light of legal powers and the legal duty of the Commission to fix fair and reasonable rates in the light of the economic conditions which prevail today and the principles determining what are fair and reasonable rates today.

Chairman Flanagan: That, Mr. Booth, if I may interrupt, was my understanding of the basis on which the intervention of the O. P. A. was granted. I am referring now to your last statement. It was not my understanding that the O. P. A. would have to assume any of the prerogatives or duties of this Commission as to the accuracy or correctness of calculations made under the sliding scale arrangement. That would be a duplication of effort and would prolong this hearing unnecessarily.

Mr. Booth: No, I will not agree with you there, Mr.
941 Chairman. If in my judgment it is clear that a pro-

vision of the sliding scale arrangement has been applied by either the company or the Commission's witnesses incorrectly, and also affecting the question as to hardship in this case, it would be my duty to point it out to the Commission and propose to do so unless prohibited by the Commission.

Chairman Flanagan: There will be no prohibition as to what you may point out. However, the hearing cannot be unduly delayed while you are duplicating work which has been done by our staff which we say is competent and experienced in handling this sort of proceeding.

Mr. Booth: I am not saying that it is not. There is nothing about our participation in this case which casts any reflection upon anybody. We are opposing—

Chairman Flanagan: Could you be a little more specific at this time, Mr. Booth, as to the aims of the O. P. A. in this proceeding and what you expect to develop and how you are now planning to develop those aims?

Mr. Booth: I will be frank with the Commission, as I have tried to be in this case and in every case. I had proposed to develop a few general facts dealing broadly with the question as to whether or not the sliding scale ar-
942 rangement had worked a hardship upon the company during the years in which it has been in operation, and whether or not it had worked out very liberally to the company.

Chairman Flanagan: No claim has been made that it did work a hardship on the company, Mr. Booth.

Mr. Booth: What I propose to show is it works out liberally to the company. This is the first year in which the company over a great many years, including the years of depression, has not earned, apparently, a liberal return. That, it seems to me, is a factor in determining today whether or not it would be a hardship to require the company to continue under existing rates.

As I say, I want to develop a few general aspects on the history of the company's operations under the sliding scale

arrangement. Some of that could be done by direct testimony, which would be brief; some of it could be done by asking Mr. Owers to present a few more facts for the record. I had also wanted to refer briefly to the rates of this company, the proposed rates, as compared with other rates of comparable companies as disclosed by published reports of the Federal Power Commission. I think such a comparison would be very interesting.

943 I had not intended to get into all of the facts of the various issues which have been raised with respect to the company's operating expenses. I had, however, proposed to demonstrate that, giving consideration only to a proper allowance to the company for taxes, and determining depreciation in accordance with the general principles of the Supreme Court of the United States, according to a decision handed down during the last year, which I think is now binding upon this Commission, and that the sliding scale arrangement must be determined in the light of principles laid down by the Supreme Court.

Chairman Flanagan: To what case are you referring, Mr. Booth?

Mr. Booth: National Gas Pipe Line Company of America v. Federal Power Commission and the Illinois Commerce Commission, where the question of determining annual depreciation expense under a sinking fund method was presented, and the Court specifically held that it was improper to apply an interest rate which did not equal the fair rate of return—

Chaiman Flanagan: Just at that point, Mr. Booth, do you happen to have an idea as to the relation of the present depreciation reserve on the company's books to

944 its plant and depreciable property?

Mr. Booth: Yes. Today I think the company has a reserve of approximately $2,000,000.

Chairman Flanagan: Percentagewise?

Mr. Booth: Yes. It happens to be not very high, but I know that they are trying to build it up, and I think it is an

excellent thing that it be built up; but that also runs into the question, Mr. Chairman, as to whether or not it is not a hardship and an illegal hardship, to require the present consumers to pay rates to build up an adequate reserve because the company failed to set aside adequate depreciation charges in prior years. That is another point. All I had planned to do was to deal with the depreciation question and to prepare some summary exhibits showing the actual earnings of the company under the sliding scale arrangement based upon a proper allowance for taxes according to principles which O. P. A. applies and which we think are proper for rate-making purposes, in order to avoid a conflict between the levies of abnormal war taxes in the Government's program and to demonstrate by all of the evidence that is before the Commission that there would be no hardship of any kind resulting if the company was required to operate under existing rates and to indi-
945 cate cases in support of that situation.

Now there is still in doubt, because the company has not yet made available, the question as to whether or not the company would be subject to an excess profits tax if a rate increase was made. The company itself has indicated if an excess profits tax in fact would be levied upon the amount of additional earnings which the company would get if a rate increase was made, that it might be impractical, and they sort of indicated they might agree with Mr. McElfresh's statement on the excess profits tax question.

I think I can show the Commission I am not planning to delay this case, but at the same time I want an adequate record in order to demonstrate whether a hardship would result if the company was required to operate under existing rates.

Chairman Flanagan: You have raised the question of excess profits taxes being incurred because of a possible rate increase being granted. That bothers us, too. The witness, Mr. Owers, has stated that to grant rates which would result in 90 per cent of those rates being turned over to the

Government does not make sense, and in view of that fact I would like to ask Mr. Owers would the company
946 consider some arrangement whereby in the event a rate increase is granted the consumers would be protected against increases in rates which would result in liability on the part of the company for excess profits taxes attributable to such rate increases. Is that a protective arrangement to which the company could give some thought and perhaps eliminate that dangerous point from our mind?

Mr. Owers: If I understand correctly—

Mr. Prettyman: May we have the Reporter real that, Mr. Chairman?

Chairman Flanagan: I have written it out and if you like, you may take this (hands paper to Mr. Prettyman).

Mr. Owers: Did I understand you correctly, Mr. Chairman, that your idea would be an arrangement whereby rates were kept at a level which kept the company under the excess profits ceiling?

Chairman Flanagan: Yes, some method which would obviate the danger which has been brought out in this hearing, which is that an increase in rates might result in imposing excess profits taxes upon the company, with the final result that the consumers were really paying the excess profits taxes through these increased rates. I think
947 that is a rather unusual arrangement, but I would like the company to consider the possibility of adopting such a protective arrangement in the event rate increases are found to be warranted.

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949 Chairman Flanagan: Suppose we leave it this way. It will take some working out, but I would like to have your staff and ours get togther and see if something feasible can be developed for presentation to the Commission.

Mr. Owers: We will be glad to do that.

Mr. Booth: May I ask one or two questions? I assume that this does not mean that the Commission has decided it

would be appropriate to allow the company as an operating expense all Federal income taxes other than excess
950 profits tax?

Chairman Flanagan: The Commission has made no decision as to the inclusion or exclusion of any item as yet.

Mr. Booth: I want to make it clear that our objection to an allowance of an increase in rates applies with equal force to the inclusion of excess profits tax as well as anything over and above the taxes that the company would be subject to based upon normal rates. Apparently there is a difference of almost $250,000 to $300,000, which in effect would wipe out the right of the company to any increase in rates.

Chairman Flanagan: As I said the other day, I have presumed you would develop for this record what in the O. P. A.'s opinion is a normal years and what are normal rates.

Mr. Booth: Correct.

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976 Mr. Booth: That will be all of Mr. Owers. At this time I want to ask Mr. McElfresh a few questions.

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988 Mr. Booth: Let the record show we will attempt to be ready on Friday morning but I will make no definite commitment that we will be, but we will try to be ready on Friday. I want also to point out in view of Mr. Prettyman's suggestion this morning that the case be closed on Friday, that that is within the discretion of the Commission. There are a lot of things here that depend upon the application of legal principles to new problems and we think they are very important and we think the Commission should either allow us 10 days or two weeks after the case is closed to prepare a brief or if the Commission should prefer to have the matter argued, that is satisfactory to me and we would require a shorter time for argument.

Chairman Flanagan: We will have that in mind for consideration.

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989 Chairman Flanagan: We will adjourn until Friday morning at 10 o'clock.

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1029 Mr. Booth: Is the hearing resumed?

Chairman Flanagan: Yes.

Mr. Booth: If the Commission please, I hesitate very much about interrupting Commissioner Hankin's questioning at this time, but because of the Chairman's statement the other day, there is a little doubt in my own mind as to the exact status which O. P. A. now has in this proceeding.

As I recall, at the time that we presented our petition for intervention on the 18th of August, our petition was granted, and may it therefore be understood, and I have a draft order—I don't know that it is necessary—that on the 18th of August the petition of the Office of Price Administration for leave to intervene in this proceeding was, of course, granted, and as was its petition to be a party in the instant proceeding. Is that understood?

Chairman Flanagan: Is to be a party to these proceedings? The Commission did grant leave to intervene.

Mr. Booth: And it was as a party to these proceedings. I recall very specifically that that was the intention of the Commission, that there was no limitation, and in fact at page 302 of the record, Mr. Prettyman stated as follows:

"I stated when I consented to the intervention that
1030 I did not concede those various paragraphs in the petition. Maybe I made a mistake in consenting. If I had known the only thing Mr. Booth was going to do was to raise issues not involved in the case, I might have objected".

Then he talks about the proposition of an intervening party coming into the proceeding when the company and the Commission are fully informed and nevertheless the inter-

vener can ask time to familiarize himself with all of the records of the company. That was the only point he was talking about. Mr. Hankin was presiding at that time and I just want to clear up that the Commission did authorize and grant the intervening petition of the Office of Price Administration.

Chairman Flanagan: Mr. Booth, when I read the statement the other day, it explained that the O. P. A. did come in at the last minute and we permitted them to intervene. That statement was an attempt to clarify what perhaps should have been clarified at the moment we granted the leave. Maybe I can make it a little clearer than it was made the other day.

In my opinion this is not the usual type of rate proceeding. The company did not come in here this year for the first time in several years to request an increase in rates;
1031 they came in here under the sliding scale arrangement which was entered into in 1935, just as they have come in every year since.

The issues can be very easily confused, but to me they are quite simple. This Commission itself must make a decision under the arrangement which was entered into in 1935 whether or not this company is entitled under the terms of that arrangement to a rate increase. That involves a very simple clear-cut question of fairness, nothing more and nothing less, and also involves, in my opinion, the integrity of this Commission, of which I am very jealous.

This must be done, let me emphasize again, under the arrangement as it exists and not as someone would like to have it reconstructed, but as it is presently, and that is the basis on which we called this hearing. That duty is the job of this Commission and that is the job that shall be done.

Now, the second point is, having determined that question we must then consider existing conditions and the bearing of those conditions upon the question before us, and by existing conditions I mean not only existing economic conditions, but the credit standing of this company, the possible

need of funds to maintain the facilities it now has and to
expand those facilities in order that the consumers
1032 might get the service they are now getting or im-
proved service. That is where the O. P. A. comes in, in my estimation, to give us the benefit of their views regarding the granting or refusing to grant a rate increase in view of general economic conditions, to prevent inflation. We are just as interested in that as the O. P. A. is. You have made a study, presumably, and you have something which will be of value to the Commission in making up its mind on the second point. There is, let me repeat, to my mind, a clear distinction and two phases to this whole proceeding.

Does that clarify it in your mind, Mr. Booth?

Mr. Booth: Yes, it clarifies it on the assumption that the petition of the Office of Price Administration for leave to intervene filed before this Commission on August 18th was granted without qualification.

Chairman Flanagan: At the date the intervention was granted there were no limitations prescribed by the Commission; that is true.

Commissioner Hankin: I want to supplement that by saying that was my understanding when I granted, on behalf of the Commission, leave to intervene; that is to say, leave to intervene in accordance with the terms of the peti-
tion for intervention. Otherwise we would have set
1033 forth limitations which would have limited the inter-
vention to specific questions.

Chairman Flanagan: Continuing, however, as I pointed out the other day, our rules of practice provide that an intervener has no right, stating it in language as I understand it, to expand the issues in a proceeding. We have already ruled with regard to a question which in our mind would have expanded the issues. I think the intervention was granted with that same proviso applicable to the O. P. A. as is applicable to any other party.

Commissioner Hankin: I don't know whether the Chairman is aware of the fact that our rule, while it states an intervener may not expand the issues in a case, also provides that he may not expand it without expressly asking for it in the petition for intervention and leave being granted by the Commission. Now, this question of what is and what is not within the issues of the case is a very nebulous one, as I see it. There seems to be quite a difference of opinion. For example, one of the questions that I raised myself was with reference to the rate base, and the Commission held that that was not within the scope of the hearing. I still do not understand how a rate can be computed without
1034 going into the correctness of the rate base, but of course the ruling of the Commission stands.

Then on last Tuesday the Chairman of the Commission suggested a method of reimbursing or the possibility of reimbursing the consumers for any increases in rates which might result in additional excess profits taxes. Well that, of course, whatever that may mean, is not within the scope of the sliding scale arrangement as such. Whether that is within the scope of the hearing or not is a debatable question. But the petition for intervention filed by O. P. A. did raise questions which may be beyond the sliding scale arrangement for which this hearing has been called. Now, if that is the case that petition asked for an extension of issues and the Commission granted the application—

Chairman Flanagan: Just a moment. I may be on thin ice when I dispute questions of law with our learned Commissioner; however, as I recall the provision, and the rules of practice will bear me out, I think, when it comes to expansion of an issue, the request to so expand must be submitted to all parties in interest and they must agree to such expansion.

Mr. Prettyman: I think the rule is perfectly clear.

Chairman Flanagan: Let us quote the rule so
1035 there will be no ambiguity about our remarks.

Commissioner Hankin: Mr. Milligan, will you get the rules?

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1036 Mr. Harrison: If the Commission please, in support of what the Chairman has just stated about the rules in respect to raising new issues, I should like to point out on August 18th, when leave to intervene was granted, that one rule of the Commission was specifically waived and only one rule, and that relates to the requirement that the petition be filed within five days. I find in the record no waiving
1037 of any other rule. It naturally follows, therefore, that the rule as to raising new issues is still in force and effect in so far as this petition is concerned, and that the petition of intervention was received in the light of those rules not waived.

Chairman Flanagan: I would like to call up the point on which we had some discussion a moment ago. Rule 7.5 of the Commission's Tentative Rules of Practice and Procedure adopted July 17, 1942, reads as follows:

"Effect on issues. The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

To me that is simple and clear language and I think we have acted in accordance with that.

Commissioner Hankin: To me it is also very simple and clear language, especially since I had a hand in the drafting of these rules. Nothing in this rule has stated that issues can be enlarged only with the consent of the other parties, as has been just stated by the Chairman. In fact, that was definitely ruled out in the draftmanship of these rules.

1038 Chairman Flanagan: I think the reading of the rule in the record supersedes any remark the Chairman might have made when he was not entirely familiar with the terminology.

Commissioner Hankin: It was also clear to me that here was a petition which expressly requested the enlargement of issues because issues were brought in the petition which are not present in the document known as the sliding scale plan, and when the petition was granted it was granted in all of its particulars, and there was nothing said which would limit the intervener in any part of the case.

Mr. Prettyman: If the Commission please, it seems to me the language of the rule is perfectly clear, and that is, if an enlargement of the issues by an intervener is desired, it must be expressly requested. The rule so states, that it must be expressly requested. Furthermore, it must be expressly granted. There is nothing in the petition that expressly requests any enlargement of the issues, and there is nothing whatsoever said by the Commission that expressly granted an enlargement of the issues.

The Commission permitted O. P. A. to intervene in accordance with the rules. The rule says the intervener can participate as a party, but under the issues as they
1039 were originally set down by the Commission for hearing, unless there is an express request and an express ruling by the Commission. There is no such thing in this case as either an express request or express ruling.

Commissioner Hankin: That, I take it, would require us to look into the petition for intervention to see whether that petition was merely based on the issues involved in the sliding scale plan or whether there was anything that goes beyond it.

Mr. Prettyman: Absolutely not. It would require the Commission to look at the petition to see if there is an express request. The ruler states in perfectly plain English words that if there is no express request, then the granting of the petition does not enlarge the issues at all. The only prayer in this petition is that the Commission enter an order granting leave to intervene and become a party. There is no other request. There is no specific request for enlargement of the issue, and that is perfectly plain.

Commissioner Hankin: Do you happen to have a copy of the petition for intervention?

Mr. Prettyman: It says, "Now therefore your petitioner prays the Commission enter an order granting him leave to intervene and become a party to this proceeding. Respectfully submitted."

1040 There is no specific request that the issues be enlarged.

Commissioner Hankin: That is the only thing stated in the petition?

Mr. Pettyman: That is the only prayer.

Commissioner Hankin: Does not the petition state the grounds upon which the O. P. A. wishes to intervene?

Mr. Prettyman: It makes the following representations—it goes on with a lot of representations. Then the only prayer is that they be allowed to intervene. That is the only request in the petition.

Commissioner Hankin: What else is necessary?

Mr. Prettyman: An express request. The rule says so.

Commissioner Hankin: Is that not an express request, if they set forth—

Mr. Prettyman: No.

Commissioner Hankin: What would be the object of setting forth all of these facts if the O. P. A. did not wish to intervene in order to demonstrate those facts?

Mr. Pettyman: I don't know why they put in all of those representations.

1041 Commissioner Hankin: I will tell you why.

Mr. Prettyman: But when they got through making their representations they made no request that the issues be enlarged. I suppose the representations were made in order to show the Commission the O. P. A. could come into the proceeding in regard to the issues raised by the order of the Commission.

Commissioner Hankin: You say you do not know why they put in all of those facts. To me it seems to be quite clear, but perhaps Mr. Booth can inform us why they were put in the petition.

Mr. Prettyman: It does not make any difference why they were put in the petition. The point is did they expressly request an enlargement of the issues, and the answer is they did not.

Commissioner Hankin: As the Chairman just stated, this entire proceeding in a sense involves the integrity of the Commission. It certainly involves the integrity of the Commission when the Commission granted leave to intervene upon certain facts presented and if we then say to the intervener "You may not present those facts"—

Chairman Flanagan: I think the reverse might be true in another way. I have no hesitancy in making this
1042 statement, Mr. Booth, that if the request for leave to intervene had made a specific request for the enlargement of the issues, I, for one, would not have voted for the granting of that petition as filed. Now, that is where the integrity of this Commission might well be involved, to permit you to come in with one request and then to permit you to expand that request into issues which we have decided are not involved in this proceeding.

Mr. Booth: That is why I say it is very vital as far as O. P. A. is concerned that this matter be cleared up and cleared up specifically.

Chairman Flanagan: I think your statement and mine are not far apart, Mr. Booth. I just draw the line as to where the responsibility rests directly upon this Commission.

1043 Mr. Booth: There is no dispute there.

Chairman Flanagan: Then I say there are other conditions which must be taken into consideration, such as those you have outlined, and I have requested the O. P. A. to give the Commission the benefit of its wisdom and investigation along this line.

Mr. Booth: Paragraphs 11, 12 and 13 state "Approval of increase in public utility rates because of increased Fedral income taxes would be contrary to the intention of Congress, inflationary in character and adversely affect the

program and policy of the Office of Price Administration to stabilize prices.

Chairman Flanagan: On that one point, as I remember it in the record, I have at least twice requested that you address yourself specifically to that question.

Mr. Booth: We propose to do so. I just want it clear, Mr. Chairman, that is now one of the issues in this case. That was Paragraph 11. Paragraph 12 states, "It appears that this is the first time since the United States entered the war the Commission is called upon to make a determination or fix rates under said sliding scale arrangement. The application of the arrangement should be reconsidered in the light of the Government's program to present inflation and stabilize the cost of living".

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Chairman Flanagan: What is there in that statement which alters my position that the duty of the Commission first is to determine whether this company is entitled to a rate increase or not, and then to take into consideration, before granting any increase, all of these other matters which are before us.

Mr. Booth: That is all I want to know, Mr. Chairman, that paragraphs 11, 12 and 13 are issues in this case as a result of the granting of our petition for intervention.

Mr. Prettyman: I do not agree to that.

Mr. Booth: If Mr. Prettyman and Mr. Stevens here are right, and of course they are wrong and we all know it—I take it from what you have said and in view of the Commission's earlier ruling, that paragraphs 11, 12 and 13 are in fact issues in this proceeding.

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Chairman Flanagan: I think I have made myself clear in dividing this proceeding into two parts. So far as the sliding scale arrangement is concerned, the Commission has the duty to figure out, first, whether this company is entitled to a rate increase strictly in accordance with the terms of the sliding scale arrangement. As to the second part, I have invited Mr. Booth to give us the benefit of his views and the views of O. P. A. with respect to income taxes

and with respect to their contention that income taxes
1048 should be treated on the basis of the so-called normal
year rather than an abnormal year. To me, that does not affect in the slightest the application of the sliding scale arrangement. It is a point in which this Commission is interested and on which we would be glad to hear the O. P. A.

Commissioner Hankin: On this particular issue I might say I do not see it in an expansion of the sliding scale arrangement because the sliding scale arrangement itself provides for only a reasonable allowance for taxes.

Chairman Flanagan: Mr. Booth, just to get a certain line of thought going on this income tax situation, do you have any idea what the national debt is at the moment, ninety billion, or something of that sort, perhaps?

Mr. Booth: I do not think it has gone up quite that much, but I assume it is rapidly approaching it.

Chairman Flanagan: It is large. May I delay this until after lunch? I wanted to adjourn at 12 o'clock, and the Commission has approved. Maybe you will go into that, and perhaps my question is premature. I will think over it during the lunch period.

Mr. Booth: I want to clear this up as to our exact status
in this proceeding and I take it now that the issues
1049 presented in paragraphs 11, 12 and 13 are issues
which the Commission can appropriately take into consideration in this proceeding.

Mr. Prettyman: We vigorously disagree with that. There is no request the issues be enlarged to include those issues in this proceeding. They are purely a representation and not a request.

Mr. Booth: We have requested the Commission to take those facts into consideration. We requested that the first time I appeared here and we have said as a matter of fact it would be illegal for the Commission to fix rates without taking those things into consideration.

Mr. Prettyman: That is a question of law.

Chairman Flanagan: We will take an adjournment until whatever hour is most convenient to all concerned. Off the record.

(Discussion off the record.)

Chairman Flanagan: We will recess until 2 o'clock.

(Thereupon at 12 o'clock noon, a recess was taken until 2 o'clock p. m.)

Afternoon Session

Met, pursuant to the taking of the recess, at 2
1050 o'clock p. m.

Chairman Flanagan: Did you want to continue, Mr. Booth?

Mr. Booth: If it is clearly understood that the issues raised by our intervening petition are now properly before the Commission as a result of the order granting us leave to intervene and be a party to the proceeding, that is all that I had raised, and as long as that is clear and on the assumption it is, I would be satisfied to drop the matter and not pursue it any further at this time.

Mr. Prettyman: I want to say it is clearly not understood by us, Mr. Chairman.

Chairman Flanagan: I have attempted to make our position clear. Perhaps we had better proceed with the hearing and if objections are made we can rule on them.

Mr. Booth: I do not know whether it would be desirable for the Commission to enter a formal order similar to the one that I have drafted as a suggestion, merely giving us an order confirming the fact that on August 18th we filed our petition for leave to intervene and be a party and that that petition was granted.

Chairman Flanagan: There is nothing that I can add to my position. Mr. Booth, and I suggest we go on
1051 with the proceeding.

Mr. Booth: Pardon me.

Commissioner Kutz: I would like to say I agree with the statement of the Chairman.

. . . . . .

1094 Mr. Booth: If the Chairman please, before the Commissioner takes up a new subject, I wonder if I may be permitted to ask the witness one or two questions, very brief questions?

Chairman Flanagan: If the Commissioner will yield the floor, I have no objection.

Commissioner Hankin: Please do. In fact, I should like you to do that whenever I have finished with one subject, so I will have a little rest.

Mr. Booth: If I feel I can make any contribution, I will interrupt you. I appreciate your courtesy.

. . . . . .

1098 Commissioner Hankin: Are you through, Mr. Booth?

Mr. Booth: Yes.

. . . . . .

1150 **Everett J. Boothby**

was recalled as a witness and having been previously duly sworn, testified further as follows:

. . . . . .

1159 Commissioner Hankin: That is all, Mr. Boothby.

Mr. Booth: I just want to ask one or two questions.

. . . . . .

1171 Mr. Booth: Yes.

That will be all of Mr. Boothby at this time.

. . . . . .

1185 Mr. Booth: I will recall Mr. Owers to the stand, unless someone else has some questions of another witness at this time.

Chairman Flanagan: Mr. Owers, take the stand.

Robert C. Owers

was recalled as a witness and, having been previously duly sworn, testified further as follows:

. . . . . .

Chairman Flanagan: Mr. Booth, as I have intimated, we are interested in O.P.A.'s ideas as to the treatment
1195 of income taxes. As to the sliding scale arrangement itself and its terms and the determination as to whether under the terms of that arrangement the company is or is not entitled to a rate increase, as I have repeatedly stated, is one problem. If you are prepared to expand the views of the O.P.A. with respect to the suggested treatment of income taxes, we would be delighted to hear those views.

Mr. Booth: I hope to have a witness this afternoon on the question.

. . . . . .

Mr. Booth: I am through with Mr. Owers and I have a few questions of Mr. McElfresh—

1211 Chairman Flanagan: What I had in mind was we are planning to adjourn at 12; are you in a position to submit this to the Commission now, Mr. Prettyman?

Mr. Booth: I was going to suggest when we resume, if we do it now it will give me a little more time because the testimony I am going to present will only take about three-quarters of an hour. I was going to suggest we resume at 2:30, even though we adjourn at 12, because the testimony I will have will not take over three-quarters of an hour and I will have to have a little talk—I have not had a chance to talk with one of the people who testified the other day.

Chairman Flanagan: What other cross examination do you plan to have, Mr. Booth?

1212 Mr. Booth: I have just a few questions of Mr. McElfresh which will only take about five or ten minutes.

. . . . . .

Mr. Booth: We are through except I want to ask Mr. McElfresh a few other questions, and I do not consider that cross examination.

Mr. Stevens: Why not put on Mr. McElfresh and finish up your questions and any questions the Commission may have of him.

Chairman Flanagan: You are excused, Mr. Owers.

(Witness excused.)

Chairman Flanagan: Will you take the stand, Mr. McElfresh.

V. A. McElfresh

was recalled as a witness, and having been previously duly sworn testified further as follows:

FURTHER CROSS EXAMINATION

Mr. Booth: Mr. McElfresh, you testified previously in this case?

Mr. McElfresh: Yes.

Mr. Booth: I believe you testified that the accounting inquiry on behalf of the Commission was under you direct charge?

Mr. McElfresh: That is right.

Mr. Booth: And you prepared, I believe, what is known as Exhibit No. 1?

Mr. McElfresh: Yes.

Mr. Booth: That is entitled "Washington Gas Light Company, Prince George's Gas Corporation, determination as of June 30, 1940, of net amount available for return and amount available for increase of rates"; is that the correct title?

Mr. McElfresh: That is correct, sir.

Mr. Booth: In your study which you made in the preparation of this exhibit did you give any consideration to the date of the company's operations under the sliding scale arrangement and its application in the light of the Government's program to prevent inflation and to stabilize the cost of living?

Mr. McElfresh: I will say that this examination was conducted and the exhibit was prepared in accordance with the requirements of the sliding scale arrangement without—

Mr. Booth: You made the same sort of study this year that you made in prior years?

Mr. McElfresh: That is right.

Mr. Harrison: Let him finish.

Mr. Booth: Pardon me.

Mr. McElfresh: The one exception is the proposed adjustment with respect to the elimination of excess profits taxes.

Mr. Booth: But even as to that item I believe you stated that you thought excess profits taxes should be provided for under the sliding scale arrangement?

Mr. McElfresh: That is correct.

Mr. Booth: But you still thought the Commission ought to throw them out?

Mr. McElfresh: I suggested that elimination for the consideration of the Commission.

Mr. Booth: But you therefore did not reconsider the operations of the company under the sliding scale
1216 arrangement as determined by you in this exhibit in the light of the Government's program to prevent inflation and to stabilize the cost of living, except perhaps as to the suggestion which you have made with respect to the excess profits taxes?

I think that is correct, sir, yes.

* * * * * * * * * *

Chairman Flanagan: I think, Mr. Booth, we have made clear exactly what we want from O.P.A. Unfortu-
1228 nately I do not think you are making any attempt to give us the benefit of what I have requested. That type of testimony is ruled out.

Mr. Booth: If the Chairman please, the position of O.P.A. is expressed in its intervening petition. We were allowed to intervene and be made a party to this proceeding—

Chairman Flanagan: That is right.

Mr. Booth: Has there been a change of mind on the part of the Commission as to whether or not we are now allowed to intervene and be a party to this proceeding?

Chairman Flanagan: Not in the least, but we have announced from the bench how and in what respects we want the advice of O.P.A.

Mr. Booth: That is, you are now attempting—

Chairman Flanagan: The time you are taking up arguing as to the legal position of O.P.A. might well be better devoted to developing some of the ideas of the O.P.A. which will help us.

Mr. Booth: Mr. Chairman, it may be that the question of the legal position of O.P.A. is a very important mat-
1229 ter from the viewpoint of O.P.A. in connection with this record and the protection of its rights in this proceeding—

Commissioner Hankin: Mr. Booth, may I ask you—

Mr. Booth: If we have been misled by the authority granted by the Commission on August 18th permitting us to intervene and whether or not the issues we raised in this proceeding are legal issues in this proceeding, of course that is a thing I have been trying to have cleared up and it has not been cleared up to my satisfaction.

Chairman Flanagan: I do not think you have been misled. I think it has been very clearly stated.

* * * * * * * * * * *

1252 Chairman Flanagan: Were you going to have a witness this afternoon, Mr. Booth?

Mr. Booth: Yes. I may have as many as two witnesses.

Chairman Flanagan: Will you put them on, please.

Mr. Booth: No, I would prefer to have the company go forward with this statement with respect to the treatment of excess profits taxes.

Chairman Flanagan: Is your witness going to cover that statement? Is he going to testify with reference to the contents of that statement?

Mr. Booth: One of my witnesses may testify with respect to that, but before any of my witnesses testify, Mr. Chairman, I am going to make some motions, but I would prefer to make them after the company puts in testimony with respect to their case.

Chairman Flanagan: I do not see it is necessary to wait for that. Do you mind making your motions now?

Mr. Booth: I will be glad to.

If the Commission please, on the 7th day of Sep-
1253 tember the President of the United States addressed a message to the Congress of the United States. In that message he reiterated the need for over-all stabilization of prices as essential to the winning of the war. Among other items he referred to an earlier message in which he stated that in order to keep the cost of living from spiraling upward we must tax heavily and in that process keep personal and corporate profits at a reasonable rate, the word reasonable being defined at a low level. He stated also that experience demonstrated that general control of prices is possible, but only if that control is all-inclusive. He called for a recognition upon the part of the American people of the need for greater sacrifice. He declared that what is needed therefore is an over-all stabilization of prices, salaries, wages and profits.

At noon today there was introduced in Congress, Senate Joint Resolution No. 161, a copy of which I propose to place into the record. This resolution is headed "Joint Resolution to aid in stabilizing the cost of living." I will read one section of it:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That in order to aid in the effective prosecution of
1254 the war, the President is authorized and directed to stabilize prices, wages, salaries and other factors affecting the cost of living; and such stabilization shall so far as practicable be on the basis of the levels which existed on August 15, 1942. In exercising the authority conferred

by this joint resolution, the President may provide for making adjustments with respect to such prices, wages, salaries and other factors, to the extent that he finds necessary to correct gross inequities or to aid in the effective prosecution of the war."

Then Section 2 goes on to provide for the promulgation of various regulations by the President from time to time.

Section 3 relates to agricultural prices.

Section 4 relates to wages.

Section 5 also relates to wages and salaries.

Section 6 is the termination date.

And Section 7 provides for amendment of Section 1(b) of the Emergency Price Control Act which is extended to June 30, 1944.

It cannot be denied that the price of gas service constitutes an important element affecting the cost of living in the District of Columbia. Nor can it be denied that the sliding scale arrangement has resulted in an exceed-
1255 ingly liberal return to the Washington Gas Light Company in the several years in which it has been in operation. It has in fact been admitted that the arrangement has not produced a hardship upon the company.

It has already been established that the company seeks an increase in rates based upon operating expenses which includes approximately $300,000 to $350,000 in income taxes in excess of the amounts paid by the company between 1936 and 1939. These additional taxes have been levied upon it by Congress as the result of the tremendous expense incurred by the nation in this war.

If there was ever a time when the utmost caution should be exercised before granting a price increase, that time is the present. This is especially true where the increase would apply to the District of Columbia, affecting several hundred thousand government workers, most of whom are themselves engaged in making substantial sacrifices through the purchases of victory bonds and personal income taxes. They live in a city where living costs are already about the

highest in the country. They, and practically all other customers of the company, are going to have enough of their own income taxes to pay without taking over the war
1256 income taxes of the Washington Gas Light Company.

The position of this company is so grossly unfair and inequitable that this Commission should lose no time in making it clear that this Commission, like the OPA, does not propose to tolerate the Company's position that its customers pay its war taxes.

When our motion for leave to intervene was filed, and it was granted by the Commission, we took the position and felt it was a reasonable position to take, that all of the issues that were raised in that motion were before the Commission, and that would include the determination on the basis of an adequate record whether or not a hardship would result if the company was required to operate at existing rates. In view of the fact that Congress now has before it a bill, a joint resolution, which provides for over-all control of all prices, in which there is a provision which says that in so far as practicable prices shall be maintained on the levels that existed as of August 15, 1942——

Chairman Flanagan: Does that include utility rates, Mr. Booth?

Mr. Booth: There is no exception. It says all prices, depending upon appropriate action of the President
1257 after the enactment of the bill, assuming that the bill would be enacted, it would provide for over-all control.

It would seem to me very inappropriate for this Commission to pass upon the question as to whether or not there should be an increase in the rates of the Washington Gas Light Company on the basis of the narrow provisions set forth in the sliding scale arrangement. However it has been my position that the Commission under paragraph 18 of the Public Utilities Act is free in this proceeding to give consideration to every relevant factor under which it must in any rate proceeding determine what is a fair and reason-

able rate and I want to read this section to the Commission. It says: "Nothing in this section shall be taken to prohibit a public utility with the consent of the Commission from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale or other financial device that may be practical and just to the parties interested. No such arrangement or device shall be lawful until it shall be found by the Commission after investigation, to be reasonable and just and not inconsistent with the purposes of this section. Such arrangement shall be under the supervision and regulation of the Commission. The Commission shall ascer-
1258 tain, determine and order such rates, charges and regulations and the duration thereof as may be necessary to give effect to such arrangement, with the right and power to make such other and further changes in rates, charges and regulations as the Commission may ascertain and determine to be necessary and reasonable, and the right to alter, or amend is reserved and vested in the Commission."

So it is my suggestion to the Commission the Commission could in this proceeding give consideration and it should and must of necessity give consideration to every relevant factor under which fair and reasonable rates be determined on the basis of law and the economic conditions of today.

In view of the status of the record, however, and I think it is pretty clear the Company has failed to show that it is entitled to any rate increase as a matter of law, I would suggest the Commission give serious consideration to the following, and I propose at a later date to supplement my statement by the filing of a written motion if adequate opportunity presents:

1. Prompt dismissal of the proceeding.
2. The continuance of this proceeding until after Con-
gress shall have acted. Of course no one knows when
1259 that will be, but I suggest it might be proper to put the case over for thirty days.

3. That if the Commission is still of the opinion after reconsideration of its legal powers with respect to the determination of fair and reasonable rates in the light of the authority which is reserved to it, notwithstanding the entry by the Commission into a sliding scale arrangement, that the Commission issue appropriate orders under which the Commission can in this proceeding give consideration to all relevant facts under which fair and reasonable rates can be determined, by a reconsideration of the sliding scale arrangement in the light of the economic conditions which we are now in, in the light of the Government's program to stabilize prices, and in the light of all other factors which the Commission must as a matter of law consider in their determination of fair and reasonable rates.

I would have preferred to put these motions in writing, but the time has been very short. I suggest to the Commission that the proceeding may be important enough for the Commission to ask for the presentation of written briefs on its legal position with respect to the effect of the sliding scale arrangement on its powers and obligations
1260 under the provisions of the Public Utilities Act under which it operates.

I thank you.

Chairman Flanagan: Your suggestions will receive the consideration of the Commission.

Mr. Booth: Do I understand——

Chairman Flanagan: I understand you have a witness now.

Mr. Booth: Yes, but I would rather have the company put in this proposal, but if not, I will call Mr. Riley.

Chairman Flanagan: We can have that proposal put in before you present the witness who will cover it.

Mr. Booth: All right.

Roderick H. Riley

1261 called as a witness on behalf of Office of Price Administration, being first duly sworn, testified as follows:

Direct examination

Mr. Booth: Will you state your name?

Mr. Riley: My name is Roderick H. Riley.

Mr. Booth: What is your residence?

Mr. Riley: I am a resident of Madison, Wisconsin. My business address is Washington, D. C.

Mr. Booth: Will you state what your present position is?

Mr. Riley: My position in the office of Price Administration is Assistant Director of Research.

Mr. Booth: Will you state your education and experience?

Mr. Riley: My education and experience include training in economics at the University of Wisconsin, from which institution I hold the B. A. and M. A. degrees and where I have completed most of the requirements for the doctorate. I have taught economics in the Universities of Wisconsin, Texas, and Cincinnati. At each of the latter two I was a member of the graduate faculty.

Prior to joining Mr. Henderson's staff, in January, 1941, I was an economist in the Department of Commerce.

1262 Mr. Booth: Will you describe your duties at the Office of Price Administration?

Mr. Riley: My position in the Office of Price Administration is Assistant Director of Research. This Division is primarily concerned with research for policy purposes and I share in the general responsibility for direction of this work. The Director of Research is also Economic Advisor to the Administrator and I work closely with him on all policy matters.

Mr. Booth: What bearing, in your opinion, do the policies of the OPA have upon the present proceeding before this Commission?

Mr. Riley: Both the OPA and this Commission have responsibility for the regulation of prices. The responsibility of the Office of Price Administration is nation-wide and extends to most prices. This Commission has responsibility for the regulation of the rates of public utilities within the

District of Columbia. The Emergency Price Control Act specifically exempts the rates of public utilties from OPA control. The reason for this exemption is plain. These prices were already under control. An administrative apparatus already existed through which the wartime
1263 control of utility rates could be exercised. They were exempted from OPA control to avoid overlapping of jurisdiction, a purely administrative reason.

The exemption of public utility rates from OPA control does not relieve public service commissions from the duty to consider the same basic facts and the same requirements of national policy as underlie the control of other prices. OPA is not the sole wartime price control agency. The regulatory commissions also are part of the war economy and to the extent of their jurisdiction must carry out the national price policy.

We are at war. We are engaged in the toughest war of all time. That war has its military fronts. It has its production front. And it has its economic front. We cannot win on the military fronts unless we win on the production front; and we cannot win the battle of production if our economy is put out of commission by inflation.

Inflation does not appear suddenly and without warning. It is not absent one day and upon us the next flooding the economy all at once. It comes by 1 percent stages, gradually and insidiously. First one price advances, then another, then several at once. Rising profits and rising living costs result in demands for increased wages; rising
1264 wage costs and rising purchasing power join forces to push prices upward. At first slowly, then more and more rapidly, the pressures spread and grow until the inflationary movement develops to dangerous proportions. Last April just that sort of development had occurred, threatening the economy and the war program. The President recognized the danger and launched the National Economic Program against inflation. Last Monday, four months later, the President sternly warned the Congress

and the entire Nation that this major battle was being lost and that our entire war effort was endangered.

The keystone of the National Economic Program is the direct control of prices and rents. The Office of Price Administration has held the line since May waiting for reinforcements. By our direct controls we have held the cost of living to a rise of less than 1¼ percent since May. The pressures have been enormous and we have not been able to hold every part of the line. Some elements have been beyond our control and have risen substantially, but others we have actually reduced and the cost of living as a whole has been prevented from rising more than a third as rapidly as it was rising in the first months of the year.

1265 It is this initial stabilization of the cost of living that makes feasible the carrying out of the balance of the President's program. Only if the cost of living is held stable can wages and other incomes be stabilized. Only if incomes are stabilized can the growth of inflationary pressure be restrained sufficiently for adequate tax and savings measures to be planned and carried out. And only if these other elements of the program are made effective can the cost of living be stabilized for the duration. Stabilization of the cost of living for the duration is the national objective in this battle. Its initial stabilization is essential to the full marshaling of our forces for the attainment of this major objective. From both the short view and the long, therefore, the present proceeding, which involves an important item in the cost of living—and which involves in principle the entire cost of living—is directly and substantially and inescapably related to the National Economic Program and to the policies of the Office of Price Administration.

Mr. Booth: What test of the reasonableness of earnings has the OPA determined to be appropriate in the wartime control of prices?

Mr. Riley: This is a matter of policy that has had the most thorough and careful examination. Under the

1266 policy decided upon, a comparison is made between current earnings before taxes and the earnings before taxes in normal pre-war years. So long as earnings before taxes do not fall below the pre-war level, they are presumptively fair and reasonable.

Mr. Booth: What is the reason for taking earnings before taxes rather than after taxes?

Mr. Riley: The taxes referred to are, of course, income and excess profits taxes. Excise taxes are included in operating costs. The inclusion of excise taxes is based upon Congressional intent, long recognized, that such taxes be passed on by the original taxpayer. In the case of income taxes and excess profits taxes, the Congressional intent is the reverse; by their very nature they are intended to be paid by the person to whom they are assessed and not to be passed on through higher prices. To include them in cost would place the Price Administrator or any other agency of price or rate control in the impossible position of sanctioning an increase of prices whenever the burden of taxation was increased. No more deliberately inflationary policy could be adopted.

The policy of including income taxes in business costs would have serious effects going far beyond the direct raising of prices. If corporate incomes are to be in-
1267 creased by the amount of additional taxes, individual incomes should be accorded the same treatment. Business and government salaries should be increased by the amount of additional income taxes. The War Labor Board formula should be amended to provide that wages shall rise to cover the workers' additional income taxes! We should all share in the remarkable privilege of passing on our war taxes to others!

Now it is perfectly obvious that no amount of such tax-passing can enable us as a nation to dodge the burden of war. It is quite possible, however, as this proceding bears witness, for any element in the community to seek to avoid paying its share of war taxes by charging higher prices.

It requires only that this lead be generally followed to put us into a completely uncontrolled inflation and lose us the war. Prices and incomes would be forced up all along the line. Rising incomes would make for higher costs and themselves would add to the pressure on prices. Under continued application of the proposed policy on taxes, all factors would combine to insure that incomes and prices would rise without limit. I repeat, no more deliberately inflationary policy could be adopted.

Mr. Booth: Has OPA recently taken a position on
1268 this problem of wartime taxes with respect to public utilities?

Mr. Riley: Yes, and in that connection I should like to refer to a recent letter of Leon Henderson to Senator Norris:

"In April our attention was called to the 15-percent increase in telephone rates made by the Northwestern Bell Telephone Co., in the State of Iowa. This increase, termed a surcharge by the company, was imposed on nearly all exchange and intra-State toll service. No regulatory agency whose permission must be first obtained for such rate increase in Iowa is provided for by the laws of that State. After obtaining the technical assistance of the Federal Communications Commission, we called the company in conference and requested it to withdraw this increase as it appeared that the higher rates were imposed in large part to effect estimated higher Federal income taxes. The company agreed to this request and subsequently withdrew a request for a rate increase of about the same character pending before the North Dakota Commission, although it had earlier obtained the approval of the South Dakota Commission for a similar increase in rates.

* * * * * * * * * *

"It is true, as you suggest,"——

1269 Mr. Booth: What you are doing now is reading from another part of the same letter; is that correct?

Mr. Riley: Yes, further on in the letter Mr. Henderson goes on to say:

"It is true, as you suggest, we filed a petition for intervention in the Bangor Hydro-Electric rate case before the Maine Public Utility Commission. There, too, it appeared that the increase requested was because of projected higher Federal income taxes. Moreover, we were advised by certain paper companies, customers of the electric company, that if the power rate increase was approved, they would seek to have our maximum prices on paper and pulp increased. While conferences were pending with respect to the date of hearing, the company withdrew its application for an increase.

. . . . . .

"The relationship of taxes to utility rates is extremely important in devising and administering a proper program to control prices and the cost of living. In peacetime the principle that a utility is entitled to a fair return after allowance of all Federal income tax has been generally accepted. As an essential war measure, however, we
1270 propose to oppose the application of this principle to any request which would contemplate an increase in rates predicated upon the allowance of anything over and above the normal Federal income tax. Higher rates predicated upon increased Federal taxes would obviously be contrary to the intention of Congress, be inflationary in character, and adversely affect our program to prevent further increases in the cost of living."

Mr. Booth: If for the purpose of this proceeding we were to use the highest tax rate during the 1936-1939 period, would that be fair as compared with OPA's policy?

Commissioner Hankin: Before you answer that question I would like to ask Mr. Riley a question with respect to that letter.

Mr. Booth: May I finish this? This is the last part of the testimony, if the Commissioner please, and I would rather have it concluded.

Commissioner Hankin: Go ahead.

Mr. Riley: Yes, that would not only be fair but, in fact, liberal.

1271 Mr. Booth: That is all. Do you have anything else to add at this time?

Mr. Riley: No.

. . . . . .

Mr. Prettyman: We have no cross-examination of Mr. Riley.

. . . . . .

1291 Chairman Flanagan: Put your witness on.

Samuel Joseph

was called as a witness on behalf of Office of Price Administration and, being first duly sworn, testified as follows:

Direct examination

Mr. Booth: Will you state your name to the reporter, please?

Mr. Joseph: My name is Samuel Joseph.

Mr. Booth: Where do you live?

Mr. Joseph: I live in Arlington, Virginia.

1292 Mr. Booth: And what is your position at the present time?

Mr. Joseph: Chief Examiner of Accounts, Division of Finance and Statistics, Bureau of Accounts, Finance and Rates, of the Federal Power Commission. For the purpose of this proceeding I am on loan by the Federal Power Commission to the Office of Price Administration.

Mr. Booth: Please state your educational background?

Mr. Joseph: I am a graduate of the Wharton School of the University of Pennsylvania, in 1928, with a degree of Bachelor of Science. I attended Columbia University graduate school of Business Administration, and did some work toward a Master's degree. I am a graduate of the Brooklyn Law School in 1933 with the degree of Bachelor of Law. I was granted a certificate as a Certified Public Accountant

by the State of New York, in 1932, and was admitted to the bar of the State of New York in 1934.

Mr. Booth: Please state your experience.

Mr. Joseph: Since 1934 I have been engaged in the public utility rate regulatory field. I have worked on statewide investigations of telephone rates in Louisiana, Alabama and West Virginia. I have also worked on investigations of other utility companies, including electric, water and gas utilities. I have testified before the Louisiana and
1293 Alabama Public Service Commissions, the Public Service Commission of West Virginia, and the Federal Power Commission.

At present, and since August, 1939, I have been employed by the Federal Power Commission. I was first employed as a Senior Examiner of Accounts and was assigned to the investigation of the Natural Gas Pipeline Company of America and Texoma Natural Gas Company as Accounting Examiner in Charge. Since then I have been promoted to the position of Chief Examiner in the Division of Finance which position I now hold.

I have taken part in the investigation of the following companies: Southern Bell Telephone and Telegraph Company in the States of Louisiana and Alabama; New Orleans Public Service Company; Louisiana Power and Light Company; Louisiana Public Utilities Company; Baton Rouge Water Company; Chesapeake and Potomac Telephone Company of West Virginia; Wheeling Electric Company; Appalachian Electric Power Company; Natural Gas Pipeline Company of America and Texoma Natural Gas Company; Panhandle Eastern Pipeline Company; Michigan Gas Transmission Corporation; and Interstate Natural Gas Company.

My present duties with the Federal Power Com-
1294 mission include the responsibility for making studies and conducting research on the subject of fair rate of return for public utilities. (a) In this connection, I am charged with the duty of keeping informed on the important subject of income and excess profits taxes and the re-

lationship of such taxes, both present and prospective, to the earnings and fair rate of return of utility companies.

Mr. Booth: Have you, at my request, prepared an exhibit for presentation in this proceeding?

Mr. Joseph: I have.

Mr. Booth: Is this the exhibit which you prepared?

Mr. Joseph: Yes.

Mr. Booth: I ask that this be marked for identification Exhibit 8.

Chairman Flanagan: It will be so marked.

(The exhibit referred to was marked for identification. Exhibit No. 8.)

Mr. Booth: Will you please explain the source of the information contained in the exhibit?

Mr. Joseph: Columns 1 and 2 of the exhibit, marked Company and P. U. C. Accountants are taken from Exhibit 2 of this proceeding. The information shown in these
1295 two columns is somewhat abbreviated but otherwise is identical with Exhibit 2.

Mr. Booth: Please explain the column headed O.P.A.

Mr. Joseph: The column headed O.P.A. is the same as that headed P. U. C. Accountants with two exceptions. The first difference is with respect to the item of depreciation and the second change is with respect to the item of income taxes.

Mr. Booth: What is the basis for the change which you have made in the item of income taxes?

Mr. Joseph: The adjustment which I have made is based upon Mr. Riley's testimony. The derivation of the dollar amount, namely $234,848 is explained in Note (a) of the exhibit. The 19 per cent rate is the highest tax rate applicable to corporations in the 1936-1939 period.

Mr. Booth: What is the basis for the change which you have made with respect to the item of depreciation?

Mr. Joseph: Pursuant to your suggestion, I used the sinking fund basis for depreciation to arrive at the annual provision for depreciation shown in my exhibit.

Mr. Booth: Was the sinking fund depreciation method used in the Natural Gas Pipeline Company of Amer-
1296 ica case?

Mr. Joseph: Yes.

Mr. Booth: Do you know whether the sinking fund depreciation method used by the Federal Power Commission was upheld in the Supreme Court's recent decision in the Natural Gas Pipeline Company of America case?

Mr. Joseph: Yes, it was.

Mr. Booth: Have you, for the purpose of your exhibit, followed the same depreciation method used by the Federal Power Commission in the Natural Gas Pipeline Company of America case?

Mr. Joseph: Yes, I have.

Mr. Booth: Please briefly explain the derivation of the figure of $120,722 shown under the column head O. P. A. for the item of depreciation.

Mr. Joseph: As is shown by the exhibit itself, this amount is that which, if set aside annually for a period of 43 years will, when compounded at an annual interest rate of 6½ per cent equal $26,000,000 at the end of the period.

Mr. Booth: Why did you use an interest rate of 6½ per cent?

Mr. Joseph: In applying the sinking fund method of depreciation it is necessary to use the same sinking
1297 fund interest rate as the rate of return. Any lower rate of return would be unfair to the ratepayers; a higher rate of interest, if used in the sinking fund calculation would be unfair to the company.

Mr. Stevens: Mr. Chairman.

Mr. Booth: Would you please permit me to conclude the testimony. It will be relatively short. Mr. Stevens, instead of encumbering the record, you can make your objection later, after I have concluded with the witness.

Mr. Stevens: Thank you.

Mr. Booth: I have not offered the exhibit in evidence yet. I propose to as soon as I complete his testimony.

Mr. Stevens: Thank you. I move, Mr. Chairman, to strike all of his testimony with respect to depreciation for reasons we have already discussed with the Commission, and it has been argued by both Mr. Booth and myself and the Commission has already ruled to exclude further testimony of this kind on depreciation.

Mr. Booth: If the Commission please I suggest the witness be given an opportunity to complete his testimony and then if the Commission is going to give any serious consideration to Mr. Stevens' statement I would like to
1298 present a brief argument in support of my reasons why the exhibit should remain in the record without any qualification.

Chairman Flanagan: As I understand it this is a calculation which bears a resemblance to the calculation made under the sliding arrangement in some respects, but not in all.

Mr. Booth: That is correct.

Chairman Flanagan: And you are attempting to explain those items in which a departure is taken from the sliding scale arrangement, such as income taxes and depreciation?

Mr. Booth: He will explain that.

Chairman Flanagan: And you say that the examination is not very lengthy from now?

Mr. Booth: No, it is relatively short. I want to make an argument on the law as to why the exhibit——

Chairman Flanagan: I think we might permit you to continue and Mr. Stevens can offer his objection at the time this exhibit is again offered for the record.

Mr. Booth: Did you conclude your explanation as to why you used an interest rate of 6½ per cent, Mr. Joseph?

Mr. Joseph: I think I did, Mr. Booth.

Mr. Booth: How did you arrive at the 43 years
1299 which you used?

Mr. Joseph: That is based on Mr. Ower's testimony in the proceeding and upon consideration of the 2.2 per cent rate of depreciation which Mr. Owers has testified the company is now using under the straight line method of depreciation.

Mr. Booth: How did you arrive at the figure of $26,000,000?

Mr. Joseph: The $26,000,000 represents my estimate of the maximum amount of depreciable property contained in the rate base figure of $28,088,332 shown in Column headed P. U. C. Accountants. Materials and supplies, cash working capital and land should be excluded in arriving at the amount of depreciable property. I have estimated that the non-depreciable property contained in the rate base figure of $28,088,322 is equal to at least $2,088,332.

Mr. Stevens: I move to strike the answer, Mr. Chairman——

Mr. Booth: Mr. Stevens——

Mr. Stevens: May I finish.

Mr. Booth: You want to strike it all, I understand?

Mr. Stevens: I move to strike that answer. This witness is expressing his opinion as to a change in rates, which is the very thing we have discussed time and again.

1300 Chairman. Flanagan: I think that motion is well taken.

Mr. Booth: I will comment on that, too, in connection with my answer to Mr. Stevens' desire to strike this testimony.

Chairman Flanagan: I prefer you comment on it now. We have the question and the objection to rule on.

Mr. Booth: Mr. Owers himself testified that in determining the annual depreciation expense of the company on its books that the annual depreciation expense was computed upon the depreciable property. I believe Mr. Owers may also have indicated that what he was doing at that time was attempting to follow the classification of accounts as prescribed by the Federal Power Commission for natural gas companies. The computation of annual depreciation expense in a rate case upon anything other than depreciable property, if the Commission please, is so flagrant a violation of the established law on the subject and the established practice with respect to the determination of depreciation expense on only depreciated property as set forth in the

various classifications of accounts prescribed by the various regulatory bodies for gas, electric, telephone and other utilities, that I do not believe this witness could partici-
1301 pate in preparation of an exhibit predicated upon so erroneous a method. I think he did it perhaps of his own volition. It is possible I also instructed him to follow the law in the situation, but the witness may have a further explanation of his own.

Mr. Stevens: Mr. Owers' testimony on the point of depreciation was on cross examination. It has never been the position of the company that that testimony was relevant to the sliding scale. It has nothing to do, as this Commission is fully aware, with the formula for computing the reserve for retirements under the sliding scale. To include such a figure as proposed by this witness in this exhibit is like comparing potatoes and eggs; there is not any comparison whatsoever. I move it be stricken.

Mr. Booth: He was not changing the rate base but merely computing the annual depreciation.

Chairman Flanagan: Mr. Booth, this is so far removed from the limits which I have attempted to impose that I must grant the motion to strike that question with regard to the depreciation. Another factor has now been injected, which is Mr. Joseph's attempt to evaluate this property.

Mr. Booth: I think you misunderstand, Mr. Chairman.

Chairman Flanagan: In his own words he has at-
1302 tempted to establish a rate base.

Mr. Booth: Not at all.

Mr. Stevens: He says these $2,000,000 should go out; did you not say that, Mr. Joseph?

Mr. Booth: No, he did not say that at all.

Mr. Joseph: I have not changed the rate base used by the Public Utilities Commission accountants at all.

Mr. Booth: No, he has not changed the rate base.

Chairman Flanagan: Let me clarify one thing. As I understand it, Mr. Joseph, in using the sinking fund method, you have followed what Mr. Booth classifies as the deter-

mination made by the Federal Power Commission in the case of Natural Gas Pipeline Company of America; is that true?

Mr. Joseph: Yes, sir.

Chairman Flanagan: With regard to percentage?

Mr. Joseph: With regard to the application of the sinking fund method of depreciation.

Chairman Flanagan: Can you mention any points of similarity between the Natural Gas Pipeline Company and the Washington Gas Light Company in the nature of their business?

Mr. Joseph: The nature of accounting for both the Natural Gas Pipeline Company of America and the
1303 Washington Gas Light Company is precisely the same in that they keep their records under the Federal Power Commission's uniform system of accounts.

Chairman Flanagan: But you have not taken the rate of depreciation specifically set out in the sliding scale arrangement, have you?

Mr. Joseph: I have changed that to conform to the sinking fund method of depreciation.

Chairman Flanagan: I am afraid I shall have to support the motion to strike the answer with respect to depreciation.

Mr. Booth: Do I understand that the ruling of the Commission—has the Chairman consulted with the Commission on the subject?

Chairman Flanagan: What?

Mr. Booth: Has the Chairman consulted with the Commission on the subject?

Chairman Flanagan: I have now.

Commissioner Hankin: I said no.

Chairman Flanagan: It is the ruling of the majority of the Commission.

Commissioner Hankin: I would like to state my
1304 reasons for the dissent. What the witness is presenting to the Commission with respect to the item of depreciation is something that corresponds to the facts

of depreciation on the company's properties. He is not setting up a different rate base; he is assuming for purposes of the case the rate base presented by the Commission's staff; he is applying an accrual sinking fund theory of depreciation on an item of $26,000,000 which he computes to be the maximum amount of depreciable property.

Now, under the sliding scale arrangement we have a method of computing depreciation not only upon the depreciable property but also on non-depreciable property, which, of course, is perfectly absurd——

Chairman Flanagan: Just a moment. I think in a moment I shall move to strike all of these remarks as they are definitely applicable to the question which has been ruled out, not once, but at least three times in this proceeding. When you come to argue in support of a dissent, I still think it is an incorrect way to handle a Commission ruling.

Commissioner Hankin: Do you mean to say a Commissioner has no right to dissent from the ruling of the Commission?

Chairman Flanagan: A Commissioner has no right
1305 to get into the record argument which he is not permitted by majority rule, either through dissent or otherwise.

Commissioner Hankin: That is a very novel ruling. However, I shall continue.

The significance of what the witness is trying to introduce in this case is this: That if it is to be considered whether the company is entitled to an increase or not, it is pertinent to consider what would have been the computations on the basis of the figures presented by the Commission but upon a proper theory of depreciation. For this reason I must dissent from the ruling of the Commission.

Mr. Booth: Mr. Joseph, after making the adjustments which you have discussed, do you find that there is an excess of deficit in this company's basic return?

Mr. Joseph: I find there is an excess.

Mr. Booth: What is the amount of the excess in basic return?

Mr. Joseph: $95,335.

Mr. Booth: If the Commission please, I thought I would be given an opportunity to comment on the motion of Mr. Stevens——

Chairman Flanagan: You did comment, Mr. Booth?

Mr. Booth: No, I did not. I meant to refer very
1306 briefly to a statement of the United States Supreme Court on this question which bears directly upon the validity of the method used in the sliding scale arrangement. I think it might be pertinent to this Commission if I could read very briefly from a decision of the United States Supreme Court on March 16, 1942, in Federal Power Commission and Illinois Commerce Commission vs. Natural Gas Pipeline Company of America.

Chairman Flanagan: In that case, Mr. Booth, an actual rate investigation was in process, was it not, involving valuation and rates of return? It was a complete new proposition before the Commission. Is that not correct?

Mr. Booth: The Commission is following the law, I take it, under which it was given authority to fix fair and reasonable rates. There is no difference between what the Commission was doing in that case and what the Commission's task and responsibility and what it is going to be required to do in this case, namely, to fix fair and reasonable rates under the law, and the sliding scale arrangement is merely a part of the process under which the Commission arrives at what are fair and legal rates. It seems to me that in connection with the suggestion that I made earlier to the Commission that this proceeding be broadened to cover
1307 the appropriate facts and issues which the Commission as a matter of law is compelled to recognize in determining these rates, it might be very appropriate for the Commission to give some consideration——

Chairman Flanagan: What case are you referring to?

Mr. Booth: The Natural Gas Pipeline case. I want to read two paragraphs in the record, if I may. May I?

Chairman Flanagan: You may.

(Quote from decision indicated.)

Mr. Booth: I say therefore that in the use of the sinking fund method such as Mr. McElfresh has testified, the sliding scale contemplates the use of the sinking method. It is improper and burdensome and contrary to this recent decision of the Supreme Court to apply a rate of interest in computing annual depreciation expense which is not identical with the rate of return which is used in determining the return this company is entitled to make.

Mr. Prettyman: We will discuss the Natural Gas case when it comes time to argue the case if the Commission wants us to, but at this time I want to point out there is nothing in the case that holds that this is the only method of computing depreciation, amortization, retirement,
1308 or whatever you have. The court repeatedly points out that the Commission had adopted this particular method. That is totally different, as Mr. Stevens has said, as potatoes are from eggs, from what we are talking about under the sliding scale in effect here. Here we have the retirement accrual method. There is nothing in this case that say you have to use the method adopted by the Commission in this particular case.

Mr. Booth: I just want to say that the company did argue that a lower rate of interest should be applied than the rate of return used and that was the issue.

Mr. Stevens: What case was that?

Mr. Booth: The Natural Gas Pipeline case. The Court and Commission both found it inequitable to the ratepayer to compute annual depreciation expense on the sinking fund method, and that is what we are doing unless the rate of return and interest rate are identical.

Mr. Prettyman: We are not computing depreciation on the sinking fund method; we are computing retirement accumulations on the scheme set up in the sliding scale.

Mr. Stevens: I think we are wasting time. I cannot believe Mr. Booth, after listening to this testimony, is still unaware of the fact that under the sliding scale we

1309 are setting up an empirical method agreed to by the Commission and the company for the purpose of determining reserve and accrual for retirement. It does not seem to me we are getting anywhere by further discussion of it and we would like to renew—

Mr. Booth: I would like to have the record show I resent Mr. Stevens' suggestion. Every time I present an idea of the case for the protection of the ratepayer and the public we are wasting time. I just cannot try the case according to the company's theory, and there are two sides in this case.

Chairman Flanagan: Are you through with your examination of Mr. Joseph?

Mr. Booth: Do you have anything further to add at this time, Mr. Joseph?

Mr. Joseph: I think not, Mr. Booth.

Mr. Booth: That is all.

* * * * * * * * * *

Mr. Stevens: I take it the case of the company and the Office of Price Administration and counsel for the
1319 Commission is closed?

Mr. Booth: Subject to the motions I have made, which the Commission has indicated they propose to take under advisement.

* * * * * * * * * *

Mr. Booth: I have two or three other brief tables I plan to offer which are merely calculations taken from
1345 either the Commission's report—I can do that now. I had overlooked—

Chairman Flanagan: Suppose you do it now.

Mr. Booth: I may or may not have a witness, but I will be glad to produce Mr. Dorfman who compiled the figures.

Chairman Flanagan: Very well.

Robert Dorfman

called as a witness on behalf of Office of Price Administration, having been first duly sworn, testified as follows:

Direct Examination

Mr. Booth: Will you state your name?

Mr. Dorfman: Robert Dorfman.

Mr. Booth: Where do you live?

Mr. Dorfman: New York City.

Mr. Booth: And who are you employed by?

Mr. Dorfman: The Office of Price Administration.

Mr. Booth: In what capacity?

Mr. Dorfman: Assistant Business Analyst.

Mr. Booth: What is the general nature of your duties?

Mr. Dorfman: To compile statistics, chiefly to deal
1346 with corporate profits and operations.

Mr. Booth: Have you prepared a table showing the Washington Gas Light Company surplus reserve for depreciation and dividends declared for the period 1936 to 1941, inclusive?

Mr. Dorfman: I have.

Mr. Booth: Is this a copy of it?

Mr. Dorfman: Yes.

Mr. Booth: I ask that this be marked as Exhibit No. 10 for identification.

Chairman Flanagan: It may be so marked.

(The document referred to was marked Exhibit No. 10 for identification.)

Mr. Booth: What was the source of your figures?

Mr. Dorfman: The annual report of the company.

Mr. Booth: The annual report of the company to the stockholders?

Mr. Dorfman: That is right.

Mr. Booth: This is the Washington Gas Light Company and not the consolidated company; is that correct?

Mr. Dorfman: Just the company itself.

Mr. Booth: You might read the figures for 1936 and 1941 in the record under each caption—that will just take a minute.

1347 Mr. Dorfman: The earned surplus as of December 31, 1936, was $5,398,927; for 1941, $6,271,726.

The depreciation reserve as of December 31, 1936, was $879,289; in 1941, it was $2,171,608.

Dividends declared during 1936 were $468,000; during 1941, $907,538.

Chairman Flanagan: Do those dividends include both dividends on preferred and common stocks?

Mr. Dorfman: Total dividends.

Mr. Stevens: There has been an increase in the amount of outstanding preferred during that period, has there not?

Mr. Dorfman: I believe there was an issue in this period.

Mr. Stevens: In the record of this case, that is clear.

Mr. Booth: I will admit that is a fact. It is not the intention to show anything else but the facts.

Mr. Stevens: Thank you.

Mr. Booth: Have you also prepared a table showing Washington Gas Light Company rate bases, earnings, rates of return and rate reductions for the years June 30, 1936, to June 30, 1941, inclusive?

Mr. Dorfman: I had most of the data transcribed from the report of the Public Utilities Commission.

1348 Mr. Booth: You have prepared such an exhibit?

Mr. Dorfman: Yes.

Mr. Booth: I ask that this be marked for identification as Exhibit No. 11. What is the source of this information?

Mr. Dorfman: Except for the year ending June 30, 1941, the 28th annual report of the Public Utilities Commission.

Mr. Booth: That is the District Commission?

Mr. Dorfman: Yes.

Mr. Booth: You took that out of that report?

Mr. Dorfman: Exactly.

Mr. Booth: Is it true that I supplied you with the figures for the year ending June 30, 1941, which I indicated I obtained from Mr. McElfresh?

Mr. Dorfman: The first two columns, and I computed the items in the third and fourth columns.

Mr. Booth: What is the average rate of return shown on the various rate bases for the period according to this table?

Mr. Dorfman: 6.86 percent.

Mr. Booth: Have you also prepared a table showing the Washington Gas Light Company rates of return on average capital employed on bases both before and after deducting income taxes for the period 1927 to 1934, inclusive?

1349

Mr. Dorfman: I have.

Mr. Booth: What is the source of that information?

Mr. Dorfman: The reports of the Federal Trade Commission.

Mr. Booth: That is the report of the Federal Trade Commission on utility corporations; is that correct?

Mr. Dorfman: Yes.

Mr. Booth: What Volume?

Mr. Dorfman: Volume 84-1.

Mr. Booth: And what page?

Mr. Dorfman: 882.

Mr. Booth: That will be all.

Mr. Stevens: I would like to ask the witness one or two explanatory questions without waiving my right to object here.

On the second exhibit—

Mr. Dorfman: What was that marked?

Mr. Stevens: That is apparently No. 11. Where did you get the figures in the second column under the heading Rate Base for the Year Weighted?

Mr. Dorfman: From the report of the Public Utilities Commission.

Mr. Stevens: Under the sliding scale arrange-

1350 ment? In other words, were those figures computed under the sliding scale arrangement?

Mr. Dorfman: I don't know.

Mr. Booth: I believe they are.

Mr. Stevens: You may believe they are, but what is the source of these figures?

Mr. Dorfman: They can be found in the 28th annual report of the Public Utilities Commission, page 82, the table at the top of the page.

Mr. Stevens: Off the record.

(Discussion off the record.)

Mr. Stevens: As to Exhibit 10 we have no objection subject to check, and as to Exhibit 11 we have no objection, also subject to check, although it is apparent that all Exhibit 11 is, is a copy of figures that appear on page 82 of the report of the Public Utilities Commission for the year 1940, the annual report. We do, however, have the basic objections to these exhibits in that they go to the basis of the sliding scale itself. If there is any purpose in these exhibits to use them for a purpose outside of the limitations as defined by the Commission in these proceedings, of course we object to them, but we agree they should be admitted if the Commission desires to do so, subject to
1351 that comment.

Mr. Booth: I do not propose to argue,—

Mr. Stevens: I do not, either.

Mr. Booth: Just a moment—that as a result of these exhibits the company is entitled to a rate increase, but exactly the reverse. So I don't want you to have any illusions as to the purpose of the exhibits, Mr. Stevens.

Mr. Stevens: Thank you.

Now, as to Exhibit 12, where did you get these figures in the second column under the words "Average capital employed"?

Mr. Dorfman: The last two lines on the page constitute, I think, a precise reference to the source.

Mr. Stevens: What does the note at the bottom of the page mean, "The appraiser value"; is the increase in the book value of the company's plant made as a result of independent valuations in 1903 and 1909?

Mr. Booth: Was that statement on the page of the report from which it was copied?

Mr. Dorfman: I don't remember. In the report from which this was copied there was a considerable discussion of the history of the corporations' assets, with thorough documentation, giving the reason for the major
1352 changes in those assets, and in the table as it ap-

peared in the text they had the phrase "Excluding added appraiser value and including added appraiser value", and I thought a short note explaining what the—

Mr. Stevens: This refers to 1903 and 1909?

Mr. Dorfman: Yes.

Mr. Stevens: Are you aware of the fact the Public Utilities Commission made a valuation of this company's properties in 1918 and again in 1934?

Mr. Dorfman: I was not aware of that.

Mr. Stevens: You were not aware of that?

Mr. Dorfman: No.

Mr. Stevens: Are these merely taken out of the report of the Federal Trade Commission?

Mr. Dorfman: Yes.

Mr. Booth: I hand you the page of the report, Mr. Stevens, from which it was copied. I will be glad, if you have any point about it, to offer the entire report of the Federal Trade Commission.

Mr. Stevens: I desire to point out the fact that the appraisals, as this note says, goes back to some old
1353 independent valuations in 1903 and 1909. Subsequent to those appraisals this Commission has conducted long valuation proceedings of this company.

Commissioner Hankin: Mr. Booth, what is the significance of this Exhibit 12?

Mr. Booth: I feel in determining the question of hardship with respect to the right of the company to an increase that it is pertinent to have before the Commission some historical earnings data, particularly to go back to the depression and during the last ten of fifteen years, and the source most readily available was this report of the Federal Trade Commission, which the Federal Trade Commission Chairman sent to Administrator Henderson with the suggestion that the report might be useful to us in this rate case.

Commissioner Hankin: What should we derive from this exhibit?

Mr. Booth: I will argue from this exhibit that this company has had an exceedingly fine record of earnings in de-

pression or out of depression, and if Mr. Stevens wants to make a point about the appraised value or value found by the Commission in 1934 or 1935, I suppose that figure, whatever the Commission found in 1935, could be compared with it. As a matter of fact, if you look at Exhibit
1354 No. 11 you will find that the rate base for the year as of June 30, 1936, was $21,052,619. So that for 1934 a higher figure was used. So it does not look as if any injustice has been done to the company by the use of either figure.

Mr. Stevens: The records of this Commission are very clear on these questions of valuation and on rates, and it seems to me that we are going pretty far afield when we inject into this proceeding the report of some other Federal commission which no one has had an opportunity to consider and which does not agree with any figures we have and does not agree with any figures the Public Utilities Commission has. If we can bring any figures like this into this proceeding it seems to me we open the door very wide. The company would have to check these figures. They are based, apparently, on valuations which have long since been superseded. I object to Exhibit 12 on the ground that it is not relevant, that this witness is not in a position to verify these figures or explain them; they are merely taken from a report of the Federal Trade Commission and even if they were proper and valid they would not have any place in this proceeding.

Mr. Booth: May I suggest this: The company this afternoon introduced into the record a rate reduction which they say they made in 1935. I take it that in view of that
1355 fact and also in view of the fact that Mr. Stevens questioned my use of the rate reductions made during the sliding scale period without consideration to that rate reduction, that it would be quite pertinent for the Commission to have the earnings data for the previous years in evidence—

Mr. Stevens: We will be glad to have the earnings data. There is no question about the earnings data.

Mr. Booth: Then I will ask—

Chairman Flanagan: Can you tie it up in any way that will assist us in determining the issue in this case, Mr. Booth?

Mr. Booth: Yes.

Chairman Flanagan: Please explain how.

Mr. Booth: The question in this case as to whether or not the company is entitled to an increase must in my judgment be predicated not purely upon the earnings of the company during the last year, even though I will admit on that basis alone, taking the company's figures on what would be a fair rate of return today, no rate reduction should be made. But I think in addition to that on the broad question of hardship to the company, as we are approaching a period of tougher times, it would be very
1356 interesting to see how the company got along during the past decade or fifteen years. This exhibit shows that based upon the capital employed the company has long enjoyed a period of exceptionally stable earnings. Its earnings have not been adversely affected during the last depression at all. They never knew we had a depression.

Commissioner Hankin: What you say may be perfectly correct, but is the company maintaining it has been maltreated in past years?

Mr. Booth: No, I think what they are afraid of is that they have got to absorb some of these war taxes.

Mr. Stevens: Now—

Commissioner Hankin: They have not claimed they have not been given sufficient earnings in past years, have they?

Mr. Stevens: Mr. Hankin, may I say this: Our objection to this exhibit is to the basis. From the figures that are used in it, and in our judgment they are unreliable and I do not like to have before the Commission unreliable figures. and neither does Mr. Prettyman. It is getting late and I would be quite willing, subject to you rapproval, Mr. Prettyman, to withdraw our objection to this exhibit and let it go in.

Commissioner Hankin: I kind of thought that, just when I was about to sustain your objection.

1357 Mr. Stevens: Mr. Hankin, I would love to have you sustain an objection of mine; that would be a moment of pride, but I feel it should go in subject to check by the staff, because the figures used are not reliable figures.

Chairman Flanagan: It may be admitted for whatever value it may possess.

Mr. Booth: I will agree to that.

(The document referred to was received and marked Exhibit No. 12.)

Mr. Booth: Exhibits 10 and 11 are also admitted?

Chairman Flanagan: Yes.

(Exhibits 10 and 11 were thereupon received in evidence.)

Commissioner Hankin: Mr. Booth, I am rather surprised in looking at these exhibits you seem to have overlooked an important element. Have you made a computation of what was the return on the common stock or on the property attributable to the common stock of the company after deducting interest and fixed charges?

Mr. Booth: I have not, but we will be very glad to do it, or the Commission can instruct its chief accountant to do it and I know he will be glad to make the calculation and have it go into the record.

1358 Commissioner Hankin: I think that would be interesting because, after all, so far as the bonds are concerned, the property represented by bonds should not have an interest. The preferred stock carries fixed dividends. The remainder of the property represented by the equity is what counts in determining what is the rate of return, and if that is low it ought to be raised, and if it is too high it might be lowered.

Mr. Stevens: Mr. Chairman, we should like to reserve the right if at any future time these exhibits take on some material importance to renew our objection to them at any future time.

Chairman Flanagan: Very well.

Mr. Booth: There is another exhibit which I had a member of the technical staff of the Federal Power Commission make, a calculation of the proposed rates of the Washington Gas Light Company on a thermal basis applicable to housekeeping consumption. It was on the basis of that table that I addressed my question to Mr. Boothby this morning about where Washington, D. C. house heating ranks in the ranking of this group of 25 communities. I did not have an opportunity to call this person over to
1359 the hearing today. It is only a one page table. I would like to submit it to the Commission's staff and the company's staff for checking. If they find no inaccuracies in it, and it will be based upon the same calculations shown in Exhibit No. 6, may it be understood that that can go in as Exhibit No. 13.

. . . . . .

1379 Mr. Stevens: May I suggest, Mr. Chairman, if it is necessary to file any memoranda for the enlightenment of the Commission that they be filed by Friday or Monday at the latest. It seems to me we have already had enough argument in this case to develop all of the idea anyone might possibly have and that oral argument is unnecessary and would merely delay the proceeding.

Mr. Booth: We have three motions before the Commission. The rules provide where a party seeks oral argument, the Commision shall hear it. I think, this case being of considerable importance and presenting a lot of novel questions, a reasonable opportunity ought to be allowed for argument and brief. I think I will be ready to argue this case within a week, but I would need a couple of weeks to file a brief.

Mr. Stevens: I say again, Mr. Chairman, this case has already been argued adnauseum throughout its course. We would like to put in a memorandum of cases of whatever may be pertinent.

Mr. Prettyman: In response to what Mr. Booth just said, I would like to quote the rule Mr. Booth referred—

1380 Mr. Booth: I beg pardon; I thought that was what it said.

Mr. Prettyman: Your last guess is correct.

Mr. Booth: I was mistaken.

Mr. Prettyman: Rule 12.15 does not say you may both argue and file a brief.

Commissioner Hankin: That does not include both.

Mr. Prettyman: No, but Mr. Booth said he was entitled to oral argument. We have suggested a written memorandum of authorities would be a more useful thing to the Commission.

Chairman Flanagan: Which do you prefer, Mr. Booth, oral argument or file a brief?

Mr. Booth: I will be ready earlier with oral argument.

Chairman Flanagan: Could you file a brief in five days, Mr. Booth?

Mr. Booth: No.

Chairman Flanagan: How long will it take?

Mr. Booth: It will take me two weeks. I have a brief due the New York Public Service Commission on Thursday. We had a brief due on Saturday with the Montana Commission. My legal staff on this work is absolutely limited. It would be easier for me to present an argument on it and that I would prefer to do not sooner than next Monday.

1381 Commissioner Hankin: I am very much afraid that oral argument will not help us as much as a written brief, which we could study and take into consideration in deciding the various items that have been brought out in this proceeding.

1382 Mr. Booth: That is entirely up to the Commission. If we are to file a brief I would like an adequate opportunity, and I do not see how we could do it really inside of two weeks. I have tried two cases recently, one before

the New York Commission and another before the Montana Commission, and those are only two of the cases which we are in. I under-estimated the time necessary for preparation of brief in the Montana Commission and I was forced to ask for additional time; for that reason and with the very difficult legal questions that are involved here, I think I would write a brief on the questions that I raised in the argument on the motions that I made to the Commission. I sincerely believe the Commission ought to have—

Mr. Stevens: I object strenuously to that delay.

1385 Chairman Flanagan: Mr. Stevens, I think five days is too short a time, but I think Mr. Booth should be ready in ten days to file a brief, and we will set ten days from today for filing briefs.

Mr. Booth: Brief and argument?

Chairman Flanagan: Do you want to argue, too?

Commissioner Hankin: After the briefs are filed the Commission can determine whether it wants to hear oral argument.

Mr. Stevens: I think that is satisfactory.

Commissioner Hankin: With reference to briefs, I understand they are to be filed within ten days.

Chairman Flanagan: Yes.

Mr. Booth: We will try to get it ready. I think if Mr. Stevens really wants to be helpful and he has a memorandum now he might make it available to us and if I have any I will be glad to—that is, on some of the special points—I will be glad to send it to him so we will be able to answer each other's position.

Mr. Stevens: I think what you are here for is to be helpful to the Commission only in matters in which the Office of Price Administration is interested, and it is not for you—

Commissioner Hankin: No, you are quite mis-

1386 taken about what counsel before this Commission are to do in the matter of filing briefs. I actually expect counsel will file briefs on all questions that were raised and supply us with the necessary authorities.

Mr. Stevens: Then we shall have to expand our memorandum.

Chairman Flanagan: Ten days from tomorrow for filing briefs; September 25th.

(Whereuopn, at 6:50 o'clock p. m., Monday, September 14, 1942, the hearing was concluded.)

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1390 *Proceedings*

Chairman Flanagan: The hearing will come to order, please.

Mr. Harrison: If the Commission please, by Order No. 2380 dated September 25, 1942, the Commission reopened the proceeding in formal Case No. 316 on the petition of the Fort Davis Citizens Association and the Washington League of Women Shoppers for leave to intervene and introduce testimony. I suppose it is appropriate at this time to have those parties enter their appearances.

Chairman Flanagan: Will the parties give their names to the Reporter, please?

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1391 Mr. Booth: If the Commission please, I have a supplemental brief which I would like to file, either now or after the close of the statements to be made on behalf of various consumers and citizens associations. I have notified the Secretary of the Commission of my intention to seek the permission of the Commission to file such a brief, and Mr. Milligan advised me over the telephone—

Chairman Flanagan: You may file the brief now.

* * * * * * * * * * *

1431 Is there any other matter in the record you think should be further clarified, Mr. Booth?

Mr. Booth: The question in my mind is this: The company having withdrawn its objection to the exhibit and the exhibit having gone into the record, the testimony which

had been stricken by the Chairman also becomes part of the testimony which is part of the record.

Chairman Flanagan: I think the matter of the method used by Mr. Joseph, in spite of objection and rulings, got into the record very clearly in various ways, Mr. Booth.

Mr. Booth: You want the record to stand the way it is, I take it?

Chairman Flanagan: I am not objecting to the record; you raised the question.

1432 Mr. Booth: I raised the question whether or not as a result of the waiver of objection by counsel for the company to Exhibit 8 and its subsequent admission, whether or not that automatically restored as evidence the testimony which Mr. Joseph had given in the record with respect to the exhibit in so far as it had been stricken, and I wanted that question cleared up.

Chairman Flanagan: I would say in my opinion the only thing that was stricken was one item with respect to depreciation.

Mr. Booth: And that still remains stricken, or it is admitted as a result of the admission of the exhibit?

Chairman Flanagan: Off the record.

(Discussion off the record.)

Mr. Prettyman: Mr. Chairman, it seems to me you brought the matter into perfectly clear focus on page 839 where you asked Mr. Joseph "You have not taken the rate of depreciation specifically set out in the sliding scale arrangement", and he answered "I have changed that to conform to the sinking fund method of depreciation". You then ruled out the answer. That does not have anything to do with the exhibit.

Chairman Flanagan: I was going to say that re-
1433 gardless of the striking of that particular phase of the testimony, the exhibit is clear on its face, and the statement to which you have just referred clarifies it even more. So I do not think it is necessary to introduce additional testimony with respect to that one point.

Mr. Booth: It seems, Mr. Chairman, it is rather inconsistent to admit an exhibit in evidence and then have the record show that certain testimony with respect to it has been stricken from the record.

Chairman Flanagan: What is your desire? Is it that we reopen it and permit you to go into that question again?

Mr. Booth: No. The effect of the Commission's ruling admitting the exhibit also has the effect of reversing the ruling of the majority of the Commission striking such testimony.

Chairman Flanagan: Whatever Mr. Joseph wanted to get in was put into the record; is that so, Mr. Booth?

Mr. Booth: I cannot see how that can be so if part of the testimony is stricken.

Chairman Flanagan: I am fully convinced Mr. Joseph's idea is fully reflected in the record and in the ex-
1434 hibit; there can be no doubt about that. The ruling is the record stands.

Commissioner Hankin: For our information, is that material part of the case or is it not?

Chairman Flanagan: It is in the record. As to whether it is material or immaterial I do not think needs to be decided here; it is to be given weight by the Commission in the consideration of the case as a whole.

1438 **PROCEEDINGS.**

Chairman Flanagan: The hearing will come to order, please.

Mr. Harrison, will you proceed?

Mr. Prettyman: Will you pardon an interruption, Mr. Harrison?

Mr. Harrison: Yes.

Mr. Prettyman: If the Commission please, in addition to the appearances heretofore noted for the Gas Company, we would like to note also the appearance of Mr. Renah F. Camalier as associate counsel for the Company.

Mr. Booth: May we also show the appearance of Mr. Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of the Honorable James F. Byrnes, Director of the Office of Economic Stabilization, David Ginsburg, general counsel, Mr. Nathaniel Nathanson, assistant general counsel, and myself, as utilities counsel for the Office of Price Administration.

Mr. Harrison: If the Commission please, under date of October 19, the Price Administrator of the Office of Price Administration, filed a petition with this Commission on behalf of the Honorable James F. Byrnes, Director of Economic Stabilization, in which petition the petitioner
1439 asks that the Commission's Order No. 2401 be vacated and that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the petitioner be allowed to intervene and file a brief in such reopened proceedings.

Under date of October 23, by Order No. 2404, the Commission reopened this proceeding and permitted the Price Administrator, on behalf of the Director of Economic Stabilization, to intervene, and reopened the proceeding for the purpose of receiving from the Office of Price Administration on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention was granted for such purpose.

If the Commission please, the petition filed on that date states that in order to effectuate the provisions of paragraph 4 of Title VI of Executive Order No. 9250, and section 1 of the Act of October 1, 1942, the Director of Economic Stabilization, on October 14, 1942, has by order, No. 1, designated the Price Administrator of the Office of Price Administration as representative of the Director of
1440 Economic Stabilization, to receive notices of increase in common carrier and other public utility rates and charges, with authority to issue appropriate requests for the receipt of such notices and to intervene and participate

in proceedings before Federal, State, and municipal authorities.

Inasmuch as that statement is made in the petition, it seems to me it might be appropriate for the Office of Price Administration to file a copy of Order No. 1 referred to, so that the Commission may be advised of the nature of the authority of the Price Administrator in this proceeding.

Accompanying, and received by the Commission at about the same time as the petition to intervene to which I have referred, the Price Administrator addressed a letter to the Chairman of the Commission under date of October 16, 1942, in respect to this particular matter. I do not have sufficient copies to offer this as an exhibit, but I think it would be well to have that letter as part of the record in this proceeding, as well as in the Commission's files, and with the Commission's permission I shall file a copy with the reporter and let him copy it into the record, or I will read the letter at this time.

Commissioner Hankin: Suppose you read the letter.

Chairman Flanagan: You may read the letter,
1441 and the reporter will then copy it into the record.

Mr. Harrison: This is dated October 16, 1942, and addressed to Mr. James H. Flanagan, Chairman, Public Utilities Commission, Washington, D. C., RE: Washington Gas Light Company, Formal Case No. 316:

"Dear Mr. Flanagan:

"My attention has been called to the opinion and order issued by your Commission on October 13 authorizing an increase in the rates of the Washington Gas Light Company and to the dissenting opinion issued by Commissioner Hankin in this case. I have observed that your order provides that the rate increase is to be retroactive as of September 1, 1942. I have also noticed that your order authorizing the increase in rates calls the Company's attention to the provisions of the Act of October 2, 1942, amending the Emergency Price Control Act of 1942 to wit as follows:

'The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That
1442 no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consent to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.'

I have also read certain newspaper statements in which appear a statement attributed to you as follows:

'I am assured by the company that it will give appropriate notice to the Hon. James F. Byrnes in compliance with the recent Act of Congress amending the Emergency Price Control Act of 1942, and that such notice will be accompanied by a copy of the findings and order of this commission.'

"This letter is to advise you that this Office has been designated by the Honorable James F. Byrnes, Director of Economic Stabilization, to represent his Office for the purpose of administering paragraph 4, Title VI, relating to notice and intervention in utility and common carrier increase cases of the Executive Order issued by the
1443 President of the United States on October 3.

"It is my judgment that the action of the Commission in issuing an order, without prior notice by the Company to the Director of Economic Stabilization, authorizing the Company to charge rates higher than those in effect on September 15, is violative both of the letter and the spirit of the Act of October 2. To deny the Director of Economic Stabilization an opportunity to intervene prior to the entry of such an order is effectively to destroy his ability to demonstrate why a proposed increase in utility rates may conflict with the program of the national government to prevent further increases in the cost of living. My

legal staff has been directed to take appropriate measures to have this order rescinded.

"I, therefore, request your Commission to re-open the proceedings and rescind the order in this case. I am authorized to state that the Director of Economic Stabilization joins in this request.

"Sincerely yours, (s) Leon Henderson, Administrator."

Now, if the Commission please, in view of the fact both by Mr. Henderson's letter and the petition filed with the Commission it has been stated that the Director of Economic Stabilization has authorized the Price Administrator to act in his behalf, and in view of the fact this Commission has had no communication from either the Director of Economic Stabilization or the Price Administrator indicating delegation of such authority, I think it may be appropriate for the Office of Price Administration to put into the record the letter showing that authority.

1444

Mr. Booth: That order is now a directive known as Directive No. 1. It has been published in the Federal Register, so I understand, and I had intended to bring a copy with me. I do not know that I have it right at this moment, but a copy will be submitted as part of the record in this case: if the reporter will leave a space at this particular part of the record, I will give the Federal Register reference.

Mr. Prettyman: If the Commission please, under date of October 14, 1942, the Washington Gas Light Company served notice on the Honorable James F. Byrnes, Economic Stabilization Director, White House, Washington, D. C., which I should like to read and have incorporated in the record.

Chairman Flanagan: Very well.

Mr. Prettyman: (reading)

1445 "Washington, D. C. October 14, 1942

"Honorable James F. Byrnes
Economic Stabilization Director
The White House
Washington, D. C.

"Dear Sir:

"We hand you herewith copy of Order No. 1458 of the Public Utilities Commission of the District of Columbia, dated December 13, 1935, which reduced gas rates and established a sliding scale arrangement with respect to rates, tolls, charges and tariffs of Washington Gas Light Company.

"This sliding scale arrangement was established pursuant to Paragraph 18 of the Act of Congress creating the Public Utilities Commission of the District of Columbia (37 Stat. 974) at the conclusion of valuation and rate proceedings held by the Commission and after public hearings in which the full information necessary to determine the reasonableness of the elements of the sliding scale arrangement was adduced.

"Since the establishment of the sliding scale arrangement and pursuant to it, annual hearings for the determination of rates of Washington Gas Light Company have been held and these have resulted in further rate reductions to the consumers of gas in the District of Columbia in the years 1936, 1938, 1939 and 1940. From time to time
1446 since 1935, the Company with the approval of the Public Utilities Commission has sold its securities to the general public, and registration statements have been filed with the Securities and Exchange Commission which included descriptions of the sliding scale arrangement.

"Pursuant to notices dated March 20, 1942 and July 21, 1942, the annual hearings under the sliding scale arrangement were commenced by the Public Utilities Commission on August 18, 1942 and were continued on August 19, September 4, 8, 11, 14 and 30. The Office of Price Administration was given leave to intervene in the proceedings and

participated therein. Testimony was adduced through witnesses for the Commission, the Company, and the Office of Price Administration. Subsequently, briefs were filed by counsel to the Company and counsel for the Office of Price Administration and arguments were had; also counsel for the Office of Price Administration was permitted to file a supplemental brief.

"On October 13, 1942, the Public Utilities Commission issued its Opinion and Order No. 2401, copy of which is herewith enclosed, and which Order promulgates an increase in rates to be charged by Washington Gas Light Company, which rates are effective as of September
1447 1, 1942, as provided by the sliding scale arrangement.

"In accordance with the Emergency Price Control Act of 1942, as amended October 2, 1942, we hereby give notice of the increase in rates and charges of this Company.

"Yours respectfully,

"WASHINGTON GAS LIGHT COMPANY

"By: Marcy L. Sperry, President."

I might state a copy of that notice was transmitted to this Commission, and I should like to have the reporter copy the wording of the letter in the record and I have extra copies of the letter.

Commissioner Hankin: May I see the letter, please?

Mr. Prettyman: Yes (hands letter to Commissioner Hankin).

Also, if the Commission please, on October 30, 1942—

Commissioner Hankin: Mr. Prettyman, may I ask a question about this letter of October 14? Do you happen to know at what time of the day this letter was sent over to Mr. Byrnes?

Mr. Prettyman: It was delivered in person by the secretary of the Washington Gas Light Company at the office of Mr. Byrnes at 3:25 p.m., Thursday, October 15.

1448 Mr. Booth: October what?

Mr. Prettyman: October 15.

Commissioner Hankin: I see.

Mr. Booth: Is that the correct date? I don't know; I am just asking you to verify it.

Mr. Prettyman: I am sure it is the correct date; 3:25 o'clock p.m., Thursday, October 15, that letter was personally delivered at the office of the Honorable James F. Byrnes at the White House by the secretary of the Washington Gas Light Company.

Commissioner Hankin: The reason I ask is, this letter dated October 14 makes reference to an opinion and Order No. 2401 which was enclosed, and I was wondering whether you also enclosed a copy of the dissent in that case.

Mr. Prettyman: Yes, sir. The following documents were handed in at the same time:

The letter dated October 14, a copy of which you have in your hand;

A copy of Order No. 1458 of this Commission dated December 13, 1935;

A copy of the Opinion and Order No. 2401, dated October 13, 1942, certified;

1449 A copy of the Dissenting Opinion of Commissioner Hankin to Order No. 2401.

Commissioner Hankin: That was the draft, or the final copy?

Mr. Prettyman: It was the copy that we had; it was officially duplicated.

Commissioner Hankin: Was it in mimeograph form?

Mr. Prettyman: A mimeograph copy.

Mr. Booth: If the Commission please, I have a file which was referred by the Director of Economic Stabilization to the Office of Price Administration in connection with this proceeding, and it does contain a complete copy—

Commissioner Hankin: Then, Mr. Prettyman, I notice in this letter of October 14 you say: "In accordance with the Emergency Price Control Act of 1942, as amended October 2, 1942, we hereby give notice of the increase in rates and charges of this Company." The statute required more than merely notice, did it not?

Mr. Prettyman: Yes, it required consent to intervention, and we did not object to the intervention of August 18, which was the first order of business in this proceeding.

Commissioner Hankin: But there was no notice
1450 of your consent to intervention by the Director of Economic Stabilization accompanying this letter.

Mr. Prettyman: At that time the Office of Price Administration was a party to this proceeding, having intervened without our objection on August 18.

I was about to read a further consent to the further intervention, which is the next document I want to put into the record.

If the Commission please, on October 30, 1942, the Washington Gas Light Company addressed to this Commission a communication which I should like to have the reporter copy into the record.

Chairman Flanagan: Very well.

Mr. Prettyman: It is dated October 30, 1942, and addressed to the Public Utilities Commission of the District of Columbia:

"We have received your Order No. 2404, reopening the hearings in Formal Case No. 316. While, as we have previously advised the Director of Economic Stabilization, we feel that the Act of October 2, 1942, has been fully complied with, we nevertheless consent to the intervention in this proceeding of the Price Administrator of the Office
1451 of Price Administration, on behalf of the Director of Economic Stabilization.

"Respectfully,

"WASHINGTON GAS LIGHT COMPANY

"By: Marcy L. Sperry, President."

The last letter I read calls attention to the fact that we had advised the Director of Economic Stabilization that we were of the opinion that the Act of October 2, 1942, had been fully complied with. I should like to put a copy of

that letter referred to, in the record. I would like to read it and have the reporter copy it into the record.

Chairman Flanagan: What letter is this, Mr. Prettyman?

Mr. Prettyman: On October 17 we wrote a letter to the Honorable James F. Byrnes, Economic Stabilization Director, and if you will notice, in the letter we wrote the Commission consenting to the intervention, we referred to our letter to him. The letter I have just read states:

"While, as we have previously advised the Director of Economic Stabilization, we feel that the Act of October 2, 1942, has been fully complied with,"—and that advice to him was in the letter dated October 17.

Chairman Flanagan: Any objection to incorporating this letter in the record?

1452 Mr. Booth: That is the letter of October 15?

Mr. Prettyman: October 17.

Mr. Booth: There is a further letter?

Mr. Prettyman: Yes.

Mr. Booth: I suppose counsel for the Company might read it—it is one of your letters?

Mr. Prettyman: Yes, to Mr. Byrnes.

Mr. Booth: How long a letter is it?

Mr. Prettyman: Two pages.

Chairman Flanagan: Without objection it may be read into the record.

Mr. Prettyman: It is dated October 17, 1942, and is addressed to the Honorable James F. Byrnes:

"Our attention has been called to your letter of October 15th, addressed to Mr. Leon Henderson, Price Administrator, in which you call attention to the press account of the order of the Public Utilities Commission of the District of Columbia entered October 13, 1942, authorizing certain increases in gas rates to be charged by this Company, and in which you said in part,

'It came to me as a surprise that such action on gas rates in the District should be taken so soon after the en-

1453 actment of the emergency legislation to stabilize the

cost of living and the issuance of the President's executive order thereunder without more deliberate consideration of the effects of such action on national policy and the conformity of such action with the letter and spirit of the law.'

"Obviously, your letter to Mr. Henderson was written before you received our letter notice which was delivered October 15th, with which we enclosed a copy of the order and opinion of the Commission. Contrary to your letter to Mr. Henderson, deliberate consideration of the factors mentioned in your letter was given by the Public Utilities Commission as is evidenced in their order and opinion and by the proceedings in the case.

"The Company since 1935 has operated under a Sliding Scale Arrangement promulgated by the Commission, under which, in addition to a rate reduction effected in 1935, additional reductions were made in the years 1936, 1938, 1939 and 1940. Pursuant to the Sliding Scale Arrangement the annual hearing for the fixing of rates for the year beginning September 1, 1942, was commenced on August 18, 1942, in accordance with orders of the Commission dated
1454 March 20, 1942, and July 21, 1942. Hearings were also held on August 19th, September 4th, 8th, 11th, 14th, and 30th. At the outset of these hearings, the Office of Price Administration filed a petition for leave to intervene. This petition was granted. Counsel for the Office of Price Administration appeared at all hearings, presented testimony, cross-examined witnesses for the Company and for the Commission and submitted two briefs. Both briefs were signed by Mr. Leon Henderson, the Price Administrator.

"The proceedings in this case were in all respects in accord with and in anticipation of the provisions of the amendment of October 2, 1942, to the Emergency Price Control Act. We feel it our duty, therefore, promptly to call these facts to your attention so that any misunderstanding with respect to the deliberate nature of the hear-

ings and of the decision of the Public Utilities Commission may be corrected.

"Yours respectfully,

"WASHINGTON GAS LIGHT COMPANY

"By: Marcy L. Sperry, President."

Commissioner Hankin: Mr. Prettyman, of what significance is this letter to this proceeding?

Mr. Prettyman: It is simply put in to complete the record, because in our notice to the Commission we
1455 call attention to the fact we had advised the Director of Economic Stabilization in regard to our view—

Commissioner Hankin: But suppose you have a certain view as to the proceedings in this Commission, of what significance is this letter to this proceeding, this letter you have written to the Director of Economic Stabilization?

Mr. Prettyman: It simply makes what has happened a part of the record.

Commissioner Hankin: Just in order to swell the record?

Mr. Prettyman: No, not to swell the record, but to complete the record.

Commissioner Hankin: If there is some significance in this letter, I would like to see it, because we have to take these things into consideration.

Mr. Prettyman: The Commission's counsel has put certain documents in the file, and we want the file to show (1) that we have filed the notice required by the Act—

Commissioner Hankin: That is significant.

Mr. Prettyman: (continuing)—(2) that we consented to the intervention.

Commissioner Hankin: That also is significant.

1456 Mr. Prettyman: In the notice to this Commission consenting to the intervention we referred to the fact we had advised the Director of Economic Stabilization that in our opinion the Act had been fully complied with,

and in order that the Commission might be fully advised as to what we told him, we want the letter in the record.

Commissioner Hankin: Is not the significance of the letter of October 17 this: You have written to the Director of Economic Stabilization on October 14 that you are giving him notice to the effect the rates had been increased, and that is all; then, later, on October 30, you consented to the intervention by the Director of Economic Stabilization through the Price Administrator. Now, in the meantime, on October 17, you wrote a letter which to my mind bears this significance, and I wish you would correct me if I am wrong, that you do not need to consent to his intervention because the Price Administrator had already intervened?

Mr. Prettyman: That is correct. That is my view. My view is there was no necessity for consent to reopening the case or for a second petition to intervene. He was already a party to the proceeding. Nevertheless we consented again, and if he petitions to intervene again we will
1457 consent again, I assume. He is already a party. I do not see any damage done by consenting.

Mr. Booth: I would like to take up as soon as possible the motion filed—

Commissioner Hankin: Just a minute. Mr. Prettyman is not through yet.

Mr. Booth: Just a moment—

Chairman Flanagan: Do you consent to this interruption, Mr. Prettyman?

Mr. Prettyman: I had some more documents to put in—

Mr. Booth: I think the motion should be given precedence, as soon as you have taken a reasonable time to argue your case in support of your position. I take it this letter constitutes part of the argument in favor of your position.

Mr. Prettyman: The only argument I have interjected was in reply to Mr. Hankin's question.

Chairman Flanagan: Will you please continue, Mr. Prettyman?

Mr. Prettyman: I should also like to introduce into the record the reply of the Honorable James F. Byrnes to our letter of October 17. I have the original in my hand. I should like to read it and introduce a copy:

1458 "Executive Office of the President
Office for Emergency Management
Office of Economic Stabilization
Washington, D. C.

October 21, 1942

"Dear Mr. Sperry:

"Receipt is acknowledged of your letter of October 17.

"My letter of October 15 to Mr. Leon Henderson, Price Administrator, calling his attention to the authorization for increased gas rates on the part of your Company issued on October 12, 1942 by the Public Utilities Commission of the District, was prompted by my understanding that no compliance with Section 1 of the Act of October 2, 1942 was had preliminary to such authorization. I was concerned at the moment with the policy question of requiring compliance on the part of all with the specific provision of the Act in question to the end that the general objectives of such Act might be secured. What action Mr. Henderson, to whom, in his capacity as Price Administrator, I have delegated the administration of Section 4, Title VI of Executive Order 9250, should take, after you have complied with the Act of October 2, 1942, is a matter that I must leave to his judgment, to be exercised in the light of the broad
1459 purposes inducing the enactment of the Act of October 2, 1942.

"Very truly yours,

"/s/ James F. Byrnes, Director."

Chairman Flanagan: Mr. Booth.

Mr. Booth: If the Commission please, on Saturday—I think it must have been very late Saturday morning—I

asked the secretary of the Commission to extend us the courtesy of filing a motion—

Chairman Flanagan: It was Saturday afternoon, was it not, Mr. Booth?

Mr. Booth: It was about 1:00 o'clock, and I want to say for the record I appreciate the courtesy extended by the Commission and its secretary in that regard.

However, I want to take up that motion now and make a statement in support of it.

In view of the statements that have been made by counsel for the Company with respect to their position in connection with their alleged previous compliance with section 1 of the amendment to the Price Control Act, enacted on October 2, I would like to ask counsel for the Company if they would be good enough to state now in the record as to just what their position is with respect to the date,
1460 the exact date, on which they believe they have a legal right to take advantage of the Commission's Order of October 13 approving an increase in the rates of the Washington Gas Light Company and the date when, on the basis of the present status of the proceeding, the Company feels it can begin to charge its customers retroactively to September 1 the higher rates which were approved by the Commission in its order of October 13.

I wondered if the Company would be kind enough to make a statement setting forth their position and their present intention in order that we and the public may understand just what their position is on that very important question.

Chairman Flanagan: Is counsel prepared to make such a statement?

Mr. Prettyman: If the Commission please, the Act of October 2, 1942, provides that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives 30 days' notice to the President or such agency as he may designate. It is already in this record

that the Company filed a notice of proposed increase in its rates and charges at 3:25 p. m., Thursday, October 15,

Commissioner Hankin: But there is also a provi-
1461 sion that you must also consent to his intervention. Now, as of what date does that consent have to take place? Can you give the Administrator notice on October 15, and then on the 29th day, after that, say, "I consent to your intervention"?

Mr. Prettyman: We consented to the intervention after he had filed his new petition to intervene, the second time. We consented to his intervention, or had not interposed any objection, as the first order of business on the first day of the hearing, which was August 18.

Mr. Booth: May I pursue this—

Commissioner Hankin: Pardon me. In other words, according to your view, Mr. Prettyman, the Company has a legal right to put its increased rates into effect retroactively beginning November 15; is that right, or November 14?

Mr. Prettyman: There has been no statement in regard to the retroactivity of the rates at all; I am not expressing any opinion on that at all. I say the Act has been complied with. It gives 30 days notice. The fact of the matter is, as you know, Mr. Hankin, the sliding scale arrangement defines the rate year of the Washington Gas Light Company and says the rate year is from September 1 to August 31;

every year since the sliding scale went into effect
1462 there has been an order of the Commission determining rates for the rate year. The order this time does exactly the same thing it has always done; it fixes the rates for the rate year of the Washington Gas Light Company which began on September 1 and which is now passing. What is to be done when the date comes around, I don't know.

Commissioner Hankin: Mr. Booth, will you please sit down for a moment? I would like to ask Mr. Prettyman some questions.

I would like to know your view about the order, because, after all, there may be some doubt as to the meaning of some of the words in it and we ought to have it clear as to what it actually means.

The order, as I recall—may I have a copy of the order—in section 2 the order says the rates, tolls, and charges to be charged by the Washington Gas Light Company, and so forth, shall be in accordance with the following rates.

Now, that apparently looks to the future, "shall be" and "to be" charged means at some time in the future. However, in section 3 of the order it says:

"Under the terms of the sliding scale arrangement, and so forth, the rates, tolls, and charges herein pre-
1463 scribed become effective as of September 1, 1942."

Now, what does this mean? Does it mean that the Company may, on November 15, begin charging rates and adding on the amounts which became effective as of September 1, or does it mean that at the expiration of the 30-day period you are going to begin charging rates which became effective at some time in the past?

Mr. Prettyman: If Your Honor please, in the sliding scale order, which is Order No. 1458, dated December 13, 1935, finding number 2, section 1, definition of terms, provides:

" 'Rate year' shall mean the 12 months period from September 1 to August 31 inclusive for which rates are being determined."

Now, the order of the Commission to which you have referred fixes the rates of the Washington Gas Light Company for this rate year which began September 1. That order speaks for itself. We have given 30 days' notice before we put increased rates for this rate year into effect. As we view the situation that means just exactly what it says, that on November 15, or whatever 30 days is, the Washington Gas Light Company proposes to increase its rates for the rate year.

1464 Commissioner Hankin: Prospectively; is that it?

Mr. Prettyman: I think the rate year begins September 1.

Commissioner Hankin: In other words, your understanding of the order is that as of November 14, which is the expiration of the 30 days, you will not only charge the increased ratae but will also add on for whatever gas has been consumed at the incremental rate?

Mr. Prettyman: I think that is the clear legal situation.

Commissioner Hankin: I simply wanted to know what was meant by this order.

Mr. Prettyman: I think that is the clear legal situation at the moment, yes, sir.

Chairman Flanagan: Mr. Booth.

Mr. Booth: Do I understand that is the present intention of the Company, Mr. Prettyman?

Mr. Prettyman: That is as far as I will state; that is my understanding of the legal situation at this moment.

Mr. Booth: You don't know whether the Company intends to take advantage of your construction of the legal situation?

Mr. Prettyman: Sometimes they do and some-
1465 times they don't.

Mr. Booth: If the Commission please, I would like to make a statement in support of the motion which was filed on Saturday, October 31, upon behalf of the Office of the Director of Economic Stabilization by Leon Henderson, Price Administrator of the Office of Price Administration.

By this motion we seek amendment of the Commission's Order of October 23, 1942, so as to permit full intervention as a party by the Price Administrator in behalf of the Director of Economic Stabilization, to make him a party to this proceeding without restriction as to the type of evidence to be presented; and that the Commission vacate its order of October 13, 1942.

On October 2, 1942, Congress adopted an amendment to the Emergency Price Control Act of 1942 to aid in preventing inflation, and for other purposes. The purpose of this Act as set forth in section 1 is as follows:

"That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living;
and, except as otherwise provided in this Act, such
1466 stabilization shall so far as practicable be on the
basis of the levels which existed on September 15, 1942. The President, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Under section 2 of the same Act, the President was empowered to promulgate regulations from time to time as may be necessary and proper to carry out the provisions of the Act and was also authorized to exercise any power or authority conferred upon him by this Act through any department, agency, or officer as he may direct. By this legislation Congress brought under regulation prices whose effective control by the earlier price control act was not
possible. Wages also come under more drastic regu-
1467 lation, and other measures were made possible for
the purpose of preventing inflation.

On the 3rd day of October, 1942, the President issued Executive Order No. 9250 in which the President estab-

lished the Office of Economic Stabilization and appointed the Honorable James F. Byrnes as the Director thereof. In that Executive Order the President stated:

"The guiding policy of the Director of the Office of Economic Stabilization and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end."

The President also declared that the Office was set up in order to control, insofar as possible, the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war.

A number of important steps, pursuant to that
1468 legislation, very important steps, have been taken by the President and the Director to carry out the policy of that Act.

By the same order the President directed the Director of Economic Stabilization to receive notices under section 1 of the Act of October 2, and subsequently, the Director of Economic Stabilization by Directive No. 1 designated the Price Administrator of the Office of Price Administration as his representative to receive notices of increases in common carrier or other public utility rates and charges and to intervene and participate in proceedings before Federal, State, and municipal authorities. The same order provided that it was not to be construed to limit the right of the Office of Price Administration on its own behalf to intervene or participate in common carrier or utility proceedings, or to take such other steps as it may deem appropriate with respect to common carrier or other public

utility rates or charges for the purpose of effectuating the policies of the Emergency Price Control Act of 1942, as amended.

On October 16, 1942, at the first meeting of the Economic Stabilization Board the Director of Economic Stabilization, the Honorable James F. Byrnes stated that:

"I have delegated to the Office of Price Administration the power to intervene in cases involving proposed increases in the rates or charges of utilities. The Office of Price Administration is the agency best suited to represent the interests of the consumer in these matters."

At the same meeting, the Director stated:

"And to all the members of the Board, I will look for suggestions to keep down the cost of living. While ours is an economy based on personal incentive and the profit system, we must at this time give more attention to keeping prices down than keeping profits up."

Few men have ever had a graver or more difficult responsibility than that which is now imposed upon the Director of Economic Stabilization, the Price Administrator, and other officials who have the major task of preserving our economic system during this war and for the peace to come in the future. In order to carry out the responsibility, the whole-hearted cooperation of agencies such as this Commission must be extended to them. The Government has the right to expect the full measure of such cooperation. Nothing less is essential to prevent all further avoidable increases in the cost of living.

It must be clear from the language of the amend-
1470 ment to section 1 of the Price Control Act and the statements made on the floor of Congress relating to the Amendment that Congress did not intend that the right to intervention should be regarded as a mere gesture. We may properly assume that Congress by requiring util-

ities to consent to intervention took for granted that any State or Federal governmental agency would without equivocation or restriction grant full and complete intervention to the designated representatives of the President and the Director of Economic Stabilization.

And it is also our position that the right to intervene meant the right to intervene as a full party, even the right to appeal was indicated by the statement of Senator Brown discussing the proposed amendment, at page 7073 of the Congressional Record, October 2, 1942.

Mr. Keech: Mr. Booth, as to intervention, you state you have the full right of intervention. Is there anything in the record which describes the extent of the intervention? You cited one page. I thought maybe you had something to indicate the true intent of Congress as to the extent of intervention.

Mr. Booth: I have just indicated, Mr. Keech, that Senator Brown, in response to questions—Senator Brown was in charge with Senator Wagner, of the price-control
1471 bill in the Senate, and as a member of the Conference Committee Senator Brown indicated that the right to intervention would include the right to appeal. Congress—

Mr. Keech: Pardon me, Mr. Booth. Is that the only reference you have to the legislative history as to the extent of intervention?

Mr. Booth: Mr. Keech, I would be very happy to refer you to the Congressional Record of those dates. If you will examine the record you will see there was a great deal of discussion by Members of the House or the Senate on that bill and on that particular amendment. There was some discussion by Senator Norris and Brown and one or two other Senators in the Senate, and there was a very brief discussion by Congressman Steagall, and a proposal by Congressman Rankin, I believe, that the House reject the conference report with respect to intervention and go back to the original Norris amendment. Then, I believe

a day or two later, Congressman Wilcox made a statement in the record in connection with this amendment. As a result of our analysis of the words of the amendment and what was said in Congress we have concluded the position which I have just taken.

Mr. Keech: Thank you, sir.

1472 Mr. Booth: In this proceeding the Commission declared that the Commission's responsibility is twofold. On this point the Commission's majority declared:

"During the present proceeding, we indicated that our responsibilities are twofold. In the first place, it is the duty of this Commission to determine, in accordance with the provisions of the sliding scale arrangement as such arrangement is now constituted, whether the Washington Gas Light Company is entitled to an increase in rates for the year commencing September 1, 1942, and the amount of such warranted increase. This responsibility is so clear-cut that to ignore it would constitute an evasion of our duty and would be a serious reflection upon the ability of this Commission to cope with its problems in a fair and impartial manner.

"Secondly, having made this determination, it is our duty to give recognition to existing conditions and the bearing of such conditions upon the question before us. In addition to the present economic situation, which admittedly is of vital importance, we must also consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia."

1473 It is clear that while the Commission has said that its duty is to give recognition to "existing conditions" and the bearing of such conditions upon the "question before us" that in fact no real or actual consideration was given to "existing conditions." The only thing the Commission did was to determine whether it was appropriate to include as an operating expense the '42 income

taxes. On this point, the Commission concluded that it should allow the Company income taxes as an operating expense according to the rate which prevailed in 1941, and it left the door wide open to still higher rates next year if taxes went up.

But in fact the Commission did not reconsider the sliding-scale arrangement in the light of current conditions. It did not determine what was the fair rate of return in view of current economic conditions. It did not determine what was the proper rate base in the light of existing conditions, or existing legal principles. It did not determine what was the fair and reasonable operating depreciation expense. The Commission merely accepted its construction of the formula of the sliding-scale arrangement at every stage of the case except the income tax allowance. It flatly ignored the argument of O. P. A. that present condi-
1474 tions arising from the war requires the Gas Company as well as everybody else to share in the burdens of the war. The Commission also overlooked the fact that the Company, having enjoyed unusual prosperity under the sliding-scale arrangement, was now earning an adequate return and that no hardship would result if the Company continued to operate at existing rates.

But it is not my purpose at this time to point out the numerous errors contained in the Commission's order of October 13. That will be done by the filing of a petition for consideration on behalf of O. P. A.

The position we must insist upon is that if we as the agent designated by the Director of Economic Stabilization are to comply with the obligations imposed upon us in utility rate proceedings, there must be no strings or restrictions attached to our ability to make an adequate showing that the rates of the Washington Gas Light Company should be no higher than charged by the Company to its customers on September 15. We must be given the right to examine every issue which the courts have held enters into the making of fair and reasonable rate regardless of

the terms of sliding-scale arrangement or previous conclusions by the Commission that a rate increase is justified. If we are to comply with applicable judicial
1475 principles affecting the question of fair and reasonable rates, we must have the right to go into at least the following factors:

(1) What is a proper rate base? And on that point an inquiry should be made and promptly as to why the rate base should not be predicated upon the original cost of the Company property. Why should the rate payers be compelled to pay increase rates upon a rate base largely in excess of the original cost of the Company's property?

(2) What are fair operating expenses of the company? Here the question of depreciation expense is a serious problem as far as the public is concerned since accrued depreciation was not deducted from the rate base.

(3) What are other proper operating expenses? Here the minority opinion by Commissioner Hankin must be given fair and adequate consideration.

(4) What are proper income taxes to be allowed or should the Company's customers pay its war taxes?

(5) What is a fair rate of return for this Company in the light of current economic conditions?

It must be of course clear that a full and complete inquiry for the purpose of determining what are fair
1476 and reasonable rates, must be made in order that the Commission may comply with its duty under the law. That was shown conclusively by the brief filed with this Commission by the Office of Price Administration and, as far as we can determine, by a reading of the Commission's Order of October 13, I am sorry to say, there does not seem to be much attention paid to that contention.

Exhibit 8 submitted by Witness Joseph showed such a rate reduction is in order. Such a conclusion is also shown by Commissioner Hankin and a complete inquiry is also essential in order that this Office be able to fulfill the responsibility imposed upon it and upon behalf of the Di-

rector of Economic Stabilization. Our right as representative of the consuming public in this war to an adequate and a fair hearing is equal to the same rights of utility companies.

It is indeed doubtful whether fair and impartial consideration could be given to any further evidence submitted in this case that rates should go no higher than on September 15 if the Commission retains in effect its order of October 13 which unjustifiably increases the rates of this Company.

The Company has itself now consented to the intervention by the Price Administrator upon behalf of the
1477 Director of Economic Stabilization, and that is shown by a letter written by counsel for the Company addressed to the Public Utilities Commission, a copy of which was sent to us, except for the position which counsel has taken that they have already complied with the provisions of the amended Price Control Act by consenting to O. P. A.'s intervention or not objecting to it on August 18. I see no strings attached to the consent given to the intervention in that letter. On that point I merely wish to say that while counsel for the Company have stated that they consented to our intervention by taking the position in the earlier proceeding that our intervention did not broaden the issues in this proceeding, they took a position, as far as I can determine, which was accepted by this Commission and which effectively prevented intervention by the Office of Price Administration for the purpose of demonstrating that in view of the war and the Government's price stabilization program, that no increase in rates was in fact justified.

We think, therefore, particularly now in view of the position which counsel for the Company have taken in respect to what they believe its legal rights to be, that the Commission has no choice but to grant in full the original petition filed by the Price Administrator in behalf of the
1478 Director of Economic Stabilization, to permit us to

intervene in full without any restrictions, and rescind the original order of October 13 pending further proceedings in the case and to reopen the proceeding in order that full, complete, and fair consideration may be given to the real issue in the proceeding, namely, what are fair and reasonable rates to this Company in the light of the judicial principles applicable to the determination of fair and reasonable rates, the Government's program to try to keep the cost of living from rising any further, and the economic conditions which we are now in?

* * * * * * * * * *

1509 Commissioner Hankin: No. I would like to ask you a question, Mr. Booth, at this time.

1510 When you use the words, "evidence relating to inflationary effect of increase in rates"—are you listening, Mr. Booth?

Mr. Booth: Yes, I certainly am.

Commissioner Hankin: (continuing)—what do you mean by "evidence relating to inflationary effect"? Just how does one go about introducing evidence relating to an inflationary effect of a given increase?

Mr. Booth: Well, I wanted to refer that question to the Commission because the Commission used, the majority of the Commission stated that it was ordered that the record in this proceeding be reopened for the purpose of receiving additional evidence relating to the inflationary effects, if any.

Commissioner Hankin: You can't lay that at the door of the Commission. As I recall, your original petition used that language.

Mr. Booth: Do you have the original petition? I think I have made that provision clear.

We would have the right to present evidence on any question affecting the Company's right to an increase according to what the courts have determined constitutes fair and reasonable rates in the light of the Government's pro-

1511 gram to prevent further increases in the cost of living.

That is, we have the right to go into any question as to what affects the determination; whether or not the Company was in fact earning a fair and reasonable return; whether existing rates were or were not reasonable; whether or not there would be any hardship on the Company if it continued to operate at existing rates, and that would involve a complete analysis of the financial affairs and the earnings of the Company so that we could determine whether or not the hardship would be upon the customer or the hardship would be upon the Company.

Commissioner Hankin: Now, when you use the words, "present evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942",—

Mr. Booth: (interposing) Where are you reading from?

Commissioner Hankin: From your petition.

Mr. Booth: Which one?

Commissioner Hankin: The one filed on October 19,— "and the effect thereon of increases in rates and charges of common carriers or other public utilities," do you

1512 mean that if, for example, an increase is granted of $100,000, that the evidence would relate to the effect of the $100,000, or would that mean that one would have to go into the rate itself and its component parts to see whether there are any inflationary elements in it?

Mr. Booth: The point about it is this—

Commissioner Hankin: Do you mean the former or the latter?

Mr. Booth: (continuing) —to go into the question of whether or not a rate increase under those circumstances was justified according to the law of the land as related to the Government's program to keep down the cost of living, and that was one of the things I had intended to address to the Chairman of the Commission, because the Order of Oc-

tober 23 is far from clear, but in my argument this morning I construed as permitting only limited intervention in line with earlier rulings of the majority of the Commission with respect to this proceeding, but that is the reason we filed this petition here.

Commissioner Hankin: Now, Mr. Booth—

Mr. Booth: (interposing) Just a moment. I would like to ask the counsel for the Company—

1513 Commissioner Hankin: No, I would like to continue asking you a question.

Let's suppose that the Commission actually meant in its Order of October 23 that you are limited to the presentation of evidence showing the $200,000 increase had an inflationary effect—are you following me?

Mr. Booth: Yes. I just cannot understand what would be in the majority of the Commission's mind with respect to it. I would say that that would be an arbitrary and illegal restriction with respect to the Director——

Commissioner Hankin: (interposing) I am not concerned with the legal consequences of it, whether it is arbitrary or not arbitrary. What I am concerned with is this.

I would like to have a clear picture in my mind just what kind of evidence could one introduce which would show the inflationary effect of that part of the rate which may be attributed to the increase.

Mr. Booth: Well, the fact is, of course, that every increase in price or increase in rates in itself is in a sense inflationary.

The question that we are concerned with is preventing avoidable increases in prices and in utility rates in
1514 this proceeding.

In order that we should make any sort of a presentation in this proceeding I have presented this motion to the Commission to clear up the status and the rights of the Director of Economic Stabilization by Leon Henderson, according to the directive issued by the Director.

And I want to ask counsel for the Company whether or not—they said they had no strings attached to our intervention. Do I understand that you have agreed——

Commissioner Hankin: (interposing) Are you answering my question by asking a question of counsel for the Gas Company?

Mr. Booth: Yes, because I wanted to clear up this question, Mr. Hankin, unless you have a further question.

Mr. Hankin: Let me first finish with my questions.

Mr. Booth: All right; I beg your pardon. I asked you whether you had completed your questions.

Commissioner Hankin: I am not through yet. I think this matter is a very serious one and we don't want to make any mistakes.

You spoke about the inflationary effect of increases. What I would like to know is this:

1515 Let's assume that a rate is so unreasonable, so unreasonably low that it is confiscatory, that the Company cannot continue doing business. Would an increase in rates under those circumstances involve any inflationary effect?

Mr. Booth: Well, I would say under these circumstances of course if the service is one which is required for the public in order to conduct the efforts of the Government in the war, or indispensably necessary for civilian use, such as gas service, that if the existing rates were so unreasonably low as to prevent the Company from conducting its operation (which of course is not the situation here), that that would not be considered as an increase which can be avoided and which would be in conflict with the Government's program.

Commissioner Hankin: But would it be inflationary?

Mr. Booth: Would it be inflationary?

Commissioner Hankin: Yes.

Mr. Booth: In a broad economic sense some of the economists use the word that any increase is inflationary. It would not be considered in my judgment as a true inflationary increase under those circumstances.

Commissioner Hankin: It would not be inflationary for what reason?

1516 Mr. Booth: Because of the fact that the public ought to have that service and the service is necessary for the purpose of the war.

Commissioner Hankin: And because the increase would bring the price in line with what it should be. Is that correct?

Mr. Booth: In a sense that would be correct, yes, Mr. Commissioner.

Commissioner Hankin: Let's suppose, instead of the existing rate being unreasonably low, it is in fact unreasonably high; then would the inflationary effect be attributable to the increase in rate or to the rate itself?

Mr. Booth: It would arise out of a combination of both circumstances. The Commission's duty under those circumstances would be to fix fair and reasonable rates.

Commissioner Hankin: Insofar as the rates are not fair and reasonable but are unreasonably high, do they involve inflationary effects?

Mr. Booth: In Executive Order No. 9250 the President directed:

"The Price Administrator in fixing, reducing, or increasing prices, shall determine price ceilings in such a

1517 manner that profits are prevented which in his judgment are unreasonable or exorbitant.

Commissioner Hankin: You are concerned with those elements really which are not attributable to the increase. Is that correct?

Mr. Booth: The question as to whether or not the existing rates are unreasonably high, in the light of current conditions and legal principles as to what are fair and reasonable rates, is a factor which of course is the primary duty of the Commission. I am not saying, Mr. Commissioner, we are not concerned with it.

Commissioner Hankin: Are you concerned with it?

Mr. Booth: We are concerned with it, but it is not possible for us to go before every commission in the country where rates are excessive and tell them to reduce utility rates.

Commissioner Hankin: I am not talking about the extent of your capacities of personnel. I am asking this.

When you file a petition for intervention do you mean to go into the reasonableness of the rates themselves as well as the reasonableness of the increase in rates?

1518 Mr. Booth: I think our petition, Mr. Hankin, and various petitions that we have set up in this case set forth our interest in this case.

We have shown on the basis of an adjustment of only two factors, namely, income taxes and depreciation, that it is the Commission's duty to reduce these rates.

Commissioner Hankin: In other words the answer is yes. Is that right?

Mr. Booth: I think——

Commissioner Hankin: (interposing) My question did not call for a long speech. I simply wanted to have specific information.

Mr. Booth: We treat each case on its own merits, Mr. Commissioner, and I think we have shown the scope of our interest in this case in the light of the various pleadings and briefs and the evidence which has been so far presented to the Commission with the restrictions that the Commission has placed on our rights.

Are you through?

Commissioner Hankin: I am through.

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1554 Chairman Flanagan: The Commission have considered the petition for amendment of Order No. 2404 of October 23, 1942, and for a stay of Order No. 2401 of October 13, 1942, filed by the Office of Price Administration on behalf of James F. Byrnes, Director of Economic Stabilization.

The ruling of General Kutz and of myself is that
1555 this petition is denied.

The Commission is now ready to receive evidence in accordance with Order No. 2404.

Commissioner Hankin: Don't you think I might state my dissent?

Chairman Flanagan: You might, very well; excuse me.

* * * * * * * * * *

1557 Chairman Flanagan: Are you ready to go forward under Order No. 2404, Mr. Booth?

Mr. Booth: If the Commission please, I think our position ought to be reasonably clear to the Commission by this time, namely, that there is a serious question as to whether the public interest could be furthered by presentation of further evidence to the Commission in this case, and I would like to have a reasonable opportunity to consult with my associates as to the future steps we should take in connection with this proceeding. I want to have the record show, of course, our exception to the ruling of the majority of the Commission, which, like the previous orders entered in this case, the order of October 13, the order of October 23, and the order refusing reopening and the order excluding Mr. Joseph's exhibit and many other orders which the majority of the Commission has from time to time entered in this case, all of which have deprived the Office of Price Administration of an apportunity to demonstrate that an increase here is in conflict with the program of the Government to prevent increases in the cost of living.

1558 I would suggest therefore that we recess until Wednesday morning, and with the approval of the Commission we will advise you definitely as to whether we can take any steps under the Commission's order of October 23 in the absence of the other relief we have prayed for, namely, that the Commission rescind the order of October 13 and grant the Director of Economic Stabilization full and complete intervention as a party in this proceeding, and for that reason I would like to have a reasonable oppor-

tunity to consult with my associates on our final position with respect to it.

Mr. Keech: Might I ask Mr. Booth one question? Do I understand now, Mr. Booth, that you have no evidence to present which would conform to Order No. 2404?

Mr. Booth: Well, Mr. Keech, I know you have been here for the first time in this hearing——

Chairman Flanagan: That has nothing to do with it, Mr. Booth. Mr. Keech has been fully informed of the progress of these proceedings.

Mr. Booth: I would like, Mr. Chairman, to respond to the question of Mr. Keech.

Chairman Flanagan: Please do.

Mr. Booth: And I can do it without any assist-
1559 ance——

Mr. Stevens: Now——

Mr. Booth: The point about that is, Mr. Keech, I have indicated our position in the matter, namely, that the Commission arbitrarily and illegally has denied the Office of the Director of Economic Stabilization——

Mr. Keech: Mr. Chairman, I did not ask for an oration; I ask for an answer to the question.

Chairman Flanagan: Please answer, Mr. Booth. We have had nothing but long speeches every time you are called on.

Mr. Booth: Just as Mr. Keech indicated, the Commission was very tolerant——

Chairman Flanagan: Are you going to answer Mr. Keech's question or not?

Mr. Booth: Certainly I am.

Chairman Flanagan: Please do so.

Mr. Booth: I think I have answered that question, namely, that unless the Commission grants the Director of Economic Stabilization the relief which we have sought for him and which we think we are entitled to as a matter of law and as a matter of equity, the question of our presentation of evidence under an order which in itself is mean-

ingless and which no adequate explanation has been
1560 made of by either Mr. Keech, Mr. Harrison, or Mr. Flanagan or General Kutz as to what the Commission meant when it used those words—under those circumstances we want a reasonable time to determine what further steps, if any, we shall take with respect to this proceeding.

Chairman Flanagan: Mr. Keech, did you get an answer that would satisfy you?

Mr. Keech: I do not consider that an answer to my question.

Chairman Flanagan: Is that the most adequate answer you can make to Mr. Keech's question, Mr. Booth?

Mr. Booth: I think Mr. Keech should understand our position with respect to why we cannot proceed with the presentation of testimony at this time in this case.

Mr. Stevens: Then it seems to me, Mr. Chairman, it is proper at this time to move that the record in this case be closed, and I so move.

Mr. Booth: I have stated to the Commission that we wish a reasonable opportunity to determine our future course with respect to this proceeding.

Mr. Stevens: This is the same old rigmarole we have been going through for two months.

1561 Mr. Booth: I don't like the use of this term "rigmarole."

Mr. Stevens: Well, strike the "rigmarole."

Mr. Booth: I know you have expressed impatience from the very first day you have been here because you did not get the increase on August 18.

Chairman Flanagan: Let us not have these exchanges between counsel. I would like to have Mr. Keech express himself on the request for delay until Wednesday.

Mr. Booth: There is no request for a delay.

Chairman Flanagan: What is it, then; will you repeat it?

Mr. Booth: I want a reasonable time to consult with my associates as to future steps to be taken in this proceeding.

Chairman Flanagan: What is your idea of a reasonable time; what do you have in mind?

Mr. Booth: Wednesday morning; I have already indicated that.

Chairman Flanagan: To reconvene the proceedings here Wednesday morning?

Mr. Booth: Or we can advise the Commission between now and Wednesday morning if we wish to reconvene and if we do not wish to come back at that time, we can advise you in the meantime.

. . . . . .

1565 Chairman Flanagan: May I ask whether you have any testimony to present along the lines laid down by Order 2404, Mr. Booth?

Mr. Booth: Apparently Mr. Keech does not understand there is a very serious doubt in my mind that in the absence of revocation by the Commission of its Order of October 13 granting the Company an increase in rates, that we could get an impartial hearing by the presentation of any additional evidence—

Chairman Flanagan: Mr. Booth, you have made remarks on this record that are objectionable from beginning to end. Let that be the last, please.

Mr. Harrison: If the Commission please, I call attention to Rule 4.4 of the Rules of Procedure before this Commission, which reads, in the second paragraph, as follows:

"Conduct amounting to contempt in any hearing before the Commission or any member of the Commission shall be grounds for exclusion from the hearing and for summary suspension for the hearing and all other proceedings."

I think in view of the contemptuous conduct of this counsel it is high time to invoke that rule.

1566 Mr. Booth: Perhaps the Commission misunderstood—

Chairman Flanagan: We have not misunderstood; it has occurred all the way through the proceeding; we have understood only too well and we have been very lenient.

Mr. Booth: The point is, under the assumption that the Commission is really interested in some real help on this case, considering its importance, I have made every effort to get men whom I consider the most competent, experienced, and impartial in the field to review this record and present evidence to the Commission on it. Among those men were Dr. James C. Bonbright, Professor of Economics in the School of Business of New York University, with whom I was in contact several times during the last ten days since the Commission entered its order. Dr. Bonbright is noted throughout the country as an outstanding scholar and expert, both as an economist and as an expert in the field of public utilities. He advised me he had, in addition to his work at Columbia University, as professor in the School of Business, and as chairman of the New York Power Authority, he has been also engaged by the Treasury Department to testify in an important proceeding in court,

1567 and only on Saturday morning did he finally decide, in view of his obligations and his health, he would be unable to undertake the work in this preceeding.

We have also obtained the assistance of Mr. Mark Wolfe, who has been an expert in the field of public utility and rate problems for a period of 25 years, he has been employed by at least nine different State commissions or States and many more municipalities in important rate cases. I have wanted him to review the record in this case in the light of the Government's program to prevent increases in the cost of living and I have an affidavit here from Mr. Wolfe which states it would take a minimum of three weeks for him to become familiar with this proceeding. But other than that—

Mr. Harrison: Was not Mr. Wolfe in the hearing room today?

Mr. Booth: Mr. Harrison—

Mr. Harrison: I understand he has been in the hearing room today.

Mr. Booth: Well, what about that? I am not interested in your views on this proceeding. I will present now, the affidavit of Mr. Wolfe.

Mr. Keech: Mr. Chairman, I object to the introduction of any affidavit when the witness was present throughout the hearing today.

1568 Mr. Booth: That is all right. I want to present the affidavit. Will the Commission receive it?

Mr. Keech: Mr. Booth knows it is not admissible.

Chairman Flanagan: The objection is sustained.

Mr. Booth: We have felt that the basic issue here is the question of the revocation of the Commission's order, and I think I have made our position clear and the strain and difficulty in which we have tried to enable the Commission in reaching a proper decision here. That was the reason I hoped, without further controversy or discussion, that the Commission would understand that it is a very serious and grave matter for us and it was not unreasonable under those circumstances for us to seek a very short postponement, without accusations from both counsel for the Commission and counsel for the Company of the character which they have made.

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1575 The Chairman: This hearing will reconvene at 10:00 o'clock Wednesday morning.

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Chairman Flanagan: Are you now ready to proceed, Mr. Booth?

1605 Mr. Booth: Yes, I am.

If the Commissioners please, at the close of the hearing on Monday I indicated that I wanted until this morning to consult with my associates in order to determine our course of action finally with respect to the Commission's order of October 23. Before I do so, however, I would like to call Mr. Owers and ask him one or two questions, and then I want to read some figures into the record.

Mr. Owers.

Robert C. Owers

was recalled as a witness and, having been previously duly sworn, testified further as follows:

Further Cross-Examination

Mr. Booth: You are the same Mr. Owers who has testified previously in this proceeding?

Mr. Owers: Yes, Mr. Booth.

Mr. Booth: And I believe you are vice-president in charge of the finances of the Company?

Mr. Owers: That is right, Mr. Booth.

Mr. Booth: I think in the earlier stages of this proceeding I had questioned you concerning this exhibit
1606 which is headed, "Washington Gas Light Company, Prince Georges Gas Corporation, Comparison of Company and Public Utilities Commission Accountants' Computation of Net Amount Available for Return"; is that correct?

Mr. Owers: I think I recall the exhibit, but I would like to see it.

Mr. Booth: This was the Company's exhibit in this case.

Mr. Owers: Yes, I am familiar with this document.

Mr. Stevens: Can you identify that by exhibit number, Mr. Booth?

Mr. Booth: Off the record.

(Discussion off the record.)

Mr. Booth: It is Exhibit No. 2.

Mr. Keech: I wonder if I might ask Mr. Booth a question.

Mr. Booth: Yes.

Mr. Keech: Is it your purpose to proceed in conformity with Order No. 2404 and present to the Commission evidence which would indicate the inflationary effect of the order which provided a rate increase to the Washington Gas Light Company?

Mr. Booth: Mr. Keech, I have asked the witness—

Mr. Keech: I ask for an answer, Mr. Chairman.

1607 Chairman Flanagan: I ask you the same question, Mr. Booth.

Mr. Booth: Do I understand that the Commission objects to my questioning Mr. Owers further?

Chairman Flanagan: Let us have an answer to Mr. Keech's question first.

Mr. Booth: I will state now what I propose to ask Mr. Owers—

Mr. Keech: Mr. Chairman, that is not responsive.

Mr. Booth: I will state now what I propose to ask Mr. Owers and—

Mr. Keech: If the Chairman please, I ask for an answer to the question. It is perfectly clear and simple and I think I am entitled to an answer.

Chairman Flanagan: Please answer the question, Mr. Booth.

Mr. Booth: The facts which I propose to develop from Mr. Owers will be very brief and they should be helpful to a determination of the rates of this Company under the law—

Chairman Flanagan: That is not responsive to Mr. Keech's question. Please make a responsive answer to the question.

Mr. Booth: Yes. The facts, I believe, will help demonstrate the inflationary effect of the Commission's
1608 order of October 13 and we would rely upon them as evidence to demonstrate the inflationary effect.

Mr. Owers, I direct your attention to the caption, "Federal Income Taxes," which is shown here in the amount "Company, $526,440"; are you familiar with that figure?

Mr. Owers: Yes.

Mr. Booth: I believe you stated earlier that that was predicated upon the Internal Revenue Act under consideration by Congress prior to the adoption of the final bill; is that correct?

Mr. Owers: This is the accrual for taxes for the test year at the rates in effect in the year 1941 and at 40 percent for the part of the test year which lies within the calendar year 1942.

Mr. Booth: Is it true, Mr. Owers, that the Revenue Act as finally adopted by Congress would result in a lower tax liability of the Company than the amount shown?

Mr. Owers: The general rate was enacted at 40 percent. There would be a credit to the Company under the Act as finally enacted with respect to the surtax on that amount of earnings which is devoted to the payment of pre-
1609 ferred dividends. So that the calculation would be somewhat different and somewhat lower if the Revenue Act of 1942 as finally enacted was used.

Mr. Booth: Will you state approximately for the record the amount of the difference in the Company's income tax liability under the method used in making that computation and under the provisions of the bill as finally enacted by Congress?

Mr. Owers: The amounts herein would be reduced by the amount of surtax, which I believe is 16 percent on the amount of preferred dividends paid. Of course, it only relates to the year 1942 and to the first six months of the year 1942.

Mr. Booth: What would the amount be, approximately?

Mr. Owers: During the first six months of 1942, to the best of my recollection, the preferred dividends paid were $135,000, and 16 percent of that would be about $37,600.

Mr. Booth: On the full year basis would the Company's liability for Federal income taxes then be about twice that amount?

Mr. Owers: On the full year basis for 1942, yes, but not on the test year basis. But looking to the future, that would be true. On the test year the amount would be about $27,000.

1610 Chairman Flanagan: Which figure is it, Mr. Owers, $37,000 or $27,000. I think you said $37,000 the first time.

Mr. Owers: $37,600.

Mr. Booth: That will be all, Mr. Owers.

Mr. Owers: I think I have made an error in this computation and I would like to go through it again.

The preferred dividends paid in the six months ended June 30, 1942, were approximately $135,000. It is only those preferred dividend payments which are the basis for deduction in the income tax returns under the new law, for surtax purposes only. The surtax rate in the new law, I believe, is 16 percent. Sixteen percent of $135,000 is $21,600, and not $37,600, as I erroneously stated.

Mr. Booth: On an annual basis that would mean a saving to the Company of approximately twice that amount?

Mr. Owers: Yes.

Mr. Booth: That will be all.

Chairman Flanagan: Any questions of Mr. Owers?

Mr. Stevens: Yes.

Commissioner Hankin: Before you ask Mr. Owers, Mr. Stevens, I would like to ask Mr. Booth what is the relevancy of the evidence that you have brought out to the
1611 question of whether the $200,000 increase, if it stands, will result in a lowering of the value of the dollar?

Mr. Booth: I think perhaps my statement was misunderstood. I said we propose to rely—I want to get in the latest accurate information that might be available relating to the Company's condition, and of course we have made our position clear the increase here is clearly avoidable and is an inflationary increase contrary to the Government's program. Before the hearing is closed I felt it my duty to correct the record on that particular point, to show that the Company was in a somewhat even slightly more favorable position, and it aided us in demonstrating, along with the other factors in the case, that the increase was of an inflationary character.

Chairman Flanagan: Mr. Stevens, do you have some questions?

Re-direct Examination

Mr. Stevens: Mr. Owers, the Company's accrual for Federal income taxes for the test year was approximately $526,440; is that correct, in accordance with Exhibit No. 2?

Mr. Owers: Yes, that is correct.

Mr. Stevens: And this credit with respect to preferred stock dividends would reduce that figure approximately $21,000?

1612 Mr. Owers: It would reduce that figure even less than that, because the $526,000 is a figure derived after allocations to service of gas outside the District, and in the calculation which I made in respect to the preferred stock dividends I was taking the total dividends and have not made any allocation of that.

Mr. Stevens: Would you care to make a rough estimate as to what the actual deduction in the accrual would be?

Mr. Owers: I believe about 15 percent of the amount which I calculated would be related to service outside the District. That would reduce the amount by which this accrual on Exhibit 2 is shown by about $18,500, or some such figure.

Mr. Stevens: So that the accrual of the $526,000 would be reduced to about $508,000?

Mr. Owers: Yes, about $508,000.

Mr. Booth: Mr.—

Mr. Stevens: Just a minute.

Now, Mr. Owers, are you familiar with the amount of taxes actually allowed as a deduction by the Public Utilities Commission in its order of October 13, 1942?

Mr. Owers: Yes, I note they allowed only 31 per-
1613 cent for taxes.

Mr. Stevens: What would mean an accrual of approximately $378,000, Mr. Owers?

Mr. Owers: Yes.

Mr. Stevens: And that would be still approximately $130,000 less than the accrual of the Company, adjusted, as you have just modified it by the deduction of approximately $18,000?

Mr. Owers: Yes, that is so.

Mr. Stevens: That is all.

Recross-examination

Mr. Booth: The computation of $526,000 was on an annual basis; is that correct?

Mr. Owers: It is for the 12 months ending June 30, 1942; yes, sir.

Mr. Booth: That will be all.

(Witness excused.)

Mr. Booth: Mr. McElfresh.

V. A. McElfresh

was recalled as a witness and, having been previously duly sworn, testified further as follows:

1614 Further Cross-examination

Mr. Booth: Mr. McElfresh, we have in the last few days asked your office whether the Washington Gas Light Company, for September, 1942—

Chairman Flanagan: Mr. Booth, are you calling Mr. McElfresh as a witness for cross-examination?

Mr. Booth: I will call him, not for cross-examination, but to bring some facts to the attention of the Commission.

Chairman Flanagan: This is also pursuant to our order?

Mr. Booth: I want to say this: We think the record is clear now that the Commission's order is inflationary in character. I do not construe the Commission's order as prohibiting the Commission from securing into the record now the latest financial data relating to the Company. If it does, then I will withdraw Mr. McElfresh because that is all I want to bring into the record now, the latest available financial information on file with the Commission, and put it into the record.

Chairman Flanagan: You will rely on it to the same extent that you rely on the answers of Mr. Owers?

Mr. Booth: I am relying on the over-all position of the Company to demonstrate an increase is not necessary. I still adhere to the position we have taken that the

1615 Commission's order of October 23 is impracticable, and the proof—what I am trying to do is to present some facts to the Commission here. If the Commission does not feel they are relevant, I am perfectly willing to have the Commission exclude them.

Mr. Keech: May I ask Mr. Booth a question?

Mr. Booth: Yes.

Mr. Keech: Do the facts which you propose to present, in your opinion, show the inflationary effect of Order No. 2401?

Mr. Booth: I don't know just what Mr. Keech—I don't know why Mr. Keech should interrupt me at this time. I am trying to bring to the attention of the Commission—

Chairman Flanagan: Mr. Booth, the case was reopened for a specific purpose. Are your inquiries directed to answering the order issued?

Mr. Booth: Do I understand that unless I am able to answer Mr. Keech's question, the Commission will not permit me to put into the record here some facts from the Company's last annual report as filed with the Commission?

Chairman Flanagan: It depends on whether you state—

Mr. Booth: I don't believe I am under any obligation a answer Mr. Keech's question.

1617 Chairman Flanagan: Please let me finish. I am asking you the same question Mr. Keech asked.

Mr. Booth: What is the question?

Mr. Keech: In the interest of time, I think I can state the question.

Mr. Booth: If the Commission please, I will not attempt to put in any more evidence.

Chairman Flanagan: You are excused, Mr. McElfresh.

(Witness excused.)

Mr. Booth: If the Commission please, upon a consideration of the record in this case, we think the record is clear, even under the restrictive conditions under which the Commission has so far permitted participation by the Office of

Price Administration in this rate proceeding that the increase in rates authorized by the Commission under its order of October 13, is contrary to the national policy of preventing further avoidable increases in the cost of living. We believe also that Congress by the enactment on October 2, 1942, of Section 1 of the amended Price Control Act intended that utility rates should not be increased over those in effect on September 15, 1942, without a complete reconsideration of existing utility rates in the light of the new Price Control Act, and the policies of the
1617 Office of the Director of Economic Stabilization and the O.P.A.

If this is to be done, complete and unequivocal intervention must, upon request such as has been in this proceeding, be accorded this Office on behalf of the Director of Economic Stabilization. The Commission's order of October 13 should also be rescinded and the case be reopened so that we can be helpful to the Commission in clearing up the conflict between this order and the national program.

This Office is still extremely anxious to aid the Commission in arriving at a proper decision in this case. If the Commission desires our further assistance it can only be given under the conditions laid down by Congress and not this Commission, its counsel, or the Company attorneys, prescribe our obligation and course of action we think we must follow in this case. Until the Commission conforms to the spirit and letter of the Act of Congress the public interest would not be served by the presentation of further evidence to the Commission.

This decision rests not only upon the failure of the Commission to permit unrestricted intervention by the Director of Economic Stabilization but also upon the Commis-
1618 sion's earlier refusal to grant earlier motions of the Office of Price Adminsistration which would have permitted a true reconsideration of the sliding-scale arrangement in the light of the Government's inflation program, the limitations placed by the Commission from time

to time on the issue in the case, the initial exclusion of testimony presented by the Office of Price Administration witness, Samuel Joseph, and the character of the order entered on October 13. By these acts the Commission has compelled us to take the position that no further testimony can be presented to the Commission.

Under the law, however, the door still remains open for the Commission to correct its decision to conform to the law. That applies both to the order of October 13 and the order of October 23. That can be done now or, upon review of a petition for reconsideration which this office proposes to file within the time permitted by the Public Utilities Act governing this Commission.

Chairman Flanagan: I understand you have no further testimony to present pursuant to our Order No. 2404; is that correct?

Mr. Booth: I think our position on that is clear. I will rest upon this statement.

1619

Chairman Flanagan: Any comment, Mr. Keech?

Mr. Keech: I have no comment to make; I have nothing further.

Chairman Flanagan: The proceedings in this case are closed.

(Thereupon, at 10:50 a.m., the proceedings were closed.)

1620 *Exhibit No. 1*

Schedule 1.

WASHINGTON GAS LIGHT COMPANY
PRINCE GEORGE'S GAS CORPORATION

Determination as of June 30, 1942 of Net Amount Available for Return and Amount Available for Increase of Rates.

Adjusted Operating Revenues (Schedule 3)		$ 8,918,656.27
Adjusted Operating Expenses (Schedule 4)		7,417,941.76
Net Amount Available for Return prior to Adjustment		$ 1,500,714.51
Adjustment for increase in certain Operating Costs as provided in Section 6, Order 1458:		
Production Labor	$20,043.06	
Production Fuels	41,572.89	
Taxes	4,929.39	$ (66,545.34)
Adjusted Amount Available for Return		$ 1,434,169.17
Rate Base as of June 30, 1942 (Schedule 2)		$28,088,331.57
Rate of Return Earned		5.1059%
Return at Basic Rate of 6½%		$ 1,825,741.55
Deficiency in Return under 6½%		$ 391,572.38
Amount Available for Rate Increase:		
5/6 of the Deficiency in Return		$ 326,310.31

Exhibit No.
Schedule 6.

SHINGTON GAS LIGHT COMPANY
PRINCE GEORGE'S GAS CORPORATION

COMPARATIVE STATEMENT OF UNADJUSTED NET OPERATING INCOME FOR THE TEST YEARS ENDED JUNE 30, 1942 AND JUNE 30, 1941.

	Test Year Ended June 30, 1942		Test Year Ended June 30, 1941		Amount of Increase or Decrease		Percent of Increase or Decrease	
	MCF	Amount	MCF	Amount	MCF	Amount	MCF	Amount
OPERATING REVENUE								
Gas Service Revenues								
Domestic	6,502,973	$5,048,376	6,166,206	$4,788,976.70	336,767	$259,400.11	5.46	5.42
Building Heating	3,499,480	2,099,159	3,385,157	2,031,208.91	114,323	67,950.58	3.38	3.35
Commercial and Industrial	2,270,391	1,398,743	2,023,436	1,246,929.86	246,955	151,813.26	12.20	12.17
Street Lighting	244	286	244	286.28	----	.05	0.00	0.00
U. S. and D. C. Governments	463,334	237,438	282,000	152,196.97	181,334	85,241.26	64.30	56.01
Sub-Total	12,736,422	$ 8,784,003	11,857,043	$8,219,598.72	879,379	$564,405.26	7.42	6.87
Washington Gas Light Company -- Montgomery County, Maryland	1,777,599	764,367	1,488,008	669,098.02	289,591	95,269.76	19.46	14.24
Roslyn Gas Company	1,067,933	426,444	645,141	289,041.29	422,792	137,403.14	65.53	47.54
Alexandria Gas Company	92,587	32,405	233,522	102,622.30	(140,935)(1)	(70,216.85)(1)	(60.35)(1)	(68.42)(1)
Washington Suburban Gas Company	115,794	43,898	85,739	32,634.45	30,055	11,264.24	35.05	34.52
Total Gas Service Revenues	15,790,335	$10,051,120	14,309,453	$9,312,994.78	1,480,882	$738,125.55	10.35	7.93
Other Revenues	-----	134,310	----	128,987.11	----	5,323.05	---	4.13
Total Operating Revenue	15,790,335	$10,185,430	14,309,453	$9,441,981.89	1,480,882	$743,448.60	10.35	7.87
OPERATING EXPENSES								
Production								
Water Gas	11,643,388	$ 2,661,291	10,695,406	$2,177,600.51	947,982	$483,690.69	8.86	22.21
Enriching Gas (Natural)	4,560,260	1,675,753	4,102,976	1,520,402.24	457,284	155,350.90	11.15	10.22
Mixed Gas	16,203,648	$ 4,337,044	14,798,382	$3,698,002.75	1,405,266	$639,041.59	9.50	17.28
Natural Gas for Resale	113,879	37,627	85,739	28,635.06	28,140	8,992.56	32.82	31.40
Total Production	16,317,527	$ 4,374,671	14,884,121	$3,726,637.81	1,433,406	$648,034.15	9.63	17.39
Distribution		1,055,969		951,022.82		104,946.66		11.03
Customers' Accounting and Collecting		543,136		512,281.59		30,854.95		
Sales Promotion Expenses		243,420		315,924.10		(72,503.60)(1)		(22.95)(1)
Administrative and General Expenses		691,967		625,536.11		66,431.04		10.62
Sub-Total		$ 6,909,165		$6,131,402.43		$777,763.20		12.68
Taxes		$ 1,234,526		$1,110,669.63		$123,857.05		11.15
Retirement Expense								
Sliding-Scale Basis		$ 379,506		$ 366,064.82		$ 13,441.83		3.67
General		109,099		84,829.97		24,269.16		28.61
Interest		74,226		64,757.47		9,469.16		14.62
Sub-Total		$ 562,832		$ 515,652.26		$ 47,180.15		9.15
Total Operating Expenses		$ 8,706,524		$7,757,724.32		$948,800.40		12.23
Net Operating Income, Unadjusted		$ 1,478,905		$1,684,257.57		($205,351.80)(1)		(12.19)(1)

(1) Parentheses indicate decrease or deduction.

1629 *Exhibit No. 2.*

WASHINGTON GAS LIGHT COMPANY
PRINCE GEORGE'S GAS CORPORATION

Comparison of Company and Public Utilities Commission Accountants' Computation of Net Amount Available for Return in Accordance with P.U.C. Order #1458

Test Year Ended June 30, 1942

	Company	P.U.C. Accountants'	Excess of Company over P.U.C.	
Rate Base				
Property	$26,915,667	$26,915,667	$	
Materials and Supplies	575,611	575,611	....	
Cash Working Capital	600,203	597,054	3,149	(A)
Total	$28,091,481	$28,088,332	$ 3,149	
Adjusted Operating Revenues	$ 8,918,656	$ 8,918,656	....	
Operating Expenses:				
Operation and Maintenance	$ 6,002,034	$ 5,970,538	$ 31,496	(B)
Depreciation	348,070	348,070	....	
General Taxes	603,996	604,916	(920)	(C)
Federal Income Taxes	526,440	494,417	32,023	(D)
	$ 7,480,540	$ 7,417,941	$ 62,599	
Adjustments under Section 6 of Order #1458				
Production Labor	20,043	20,043	....	
Production Fuel	44,868	41,573	3,295	(E)
Taxes	7,086	4,929	2,157	(F)
Total Adjusted Operating Expenses	$ 7,552,537	$ 7,484,486	$ 68,051	
Adjusted Net Operating Revenues	$ 1,366,119	$ 1,434,170	$(68,051)	
6.50% of Rate Base	1,825,946	1,825,742	204	(G)
Deficit in Basic Return	$ 459,827	$ 391,572	$ 68,255	
Amount Available for Rate Increase—5/6 of Deficit in Basic Return	$ 383,189	$ 326,310	$ 56,879	

	Stipulation Item No.	Amount
(A) Difference is 10% of net difference in adjusted operating expenses, before depreciation and taxes (See Item B)		$ 3,149

	Stipulation Item No.	Amount
(B) Items charged to Operating Expense—excluded by P.U.C. Accountants—		
Payment to Greater National Capital Committee	1	$ 89
Sales promotion expenses—considered applicable to Merchandise and Jobbing operations	2	26,825
Expenses in connection with abandoned financing	3	3,257
Payment to United Service Organization	4	1,250
Charges under Miscellaneous Trust Fund Order #115 relative to $5.00 Cumulative Preferred Stock		75
		$31,496

( ) Indicates red figures.

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	Stipulation Item No.	Amount
(C) D. C. income tax allocated to Merchandise and Jobbing operations by Company		$ (923)
Minor difference—not reconciled		3
		$ (920)
(D) Difference in Federal income taxes due to treatment by Company and P.U.C. Accountants	5	$32,023
(E) Difference in fuel adjustment due to use by P.U.C. Accountants of May 31, 1942 average inventory unit prices, whereas Company used June 30, 1942 average inventory unit prices in calculating adjustment under Section 6 of Order #1458	6	$ 3,295
(F) Difference in adjustment of taxes under Section 6 of Order #1458 due to treatment of Federal income taxes, as referred to in Item D, above		$ 2,157
(G) Difference represents 6½% of $3,149 difference in working capital as referred to in Item A.		$ 204

( ) Indicates red figures.

EX. 9.

1656 WASHINGTON GAS LIGHT COMPANY

Proposed Increase of Domestic Bills

Effect of Proposed Rate Increase on Monthly Bills of Domestic Customers without Space Heating.

Present Rate (Net)	Proposed Rate (Net)
1st 800 cf. or less $0.75	1st 700 cf. or less $0.75
Next 1,700 cf. @ 8.0¢/C	Next 2,300 cf. @ 8.0¢/C
Next 3,500 cf. @ 7.0¢/C	Next 4,000 cf. @ 7.0¢/C
Over 6,000 cf. @ 6.1¢/C	Over 7,000 cf. @ 6.2¢/C.
Min. Bill $0.75	Min. Bill $0.75

Cu. Ft. Per Mo.	Monthly Bill Present Rate A	Monthly Bill Proposed Rate A	Increase
700	0.75	0.75	—
800	0.75	0.83	8 ¢
1,000	0.91	0.99	8 ¢
1,200	1.07	1.15	8 ¢
1,500	1.31	1.39	8 ¢
2,000	1.71	1.79	8 ¢
2,500	2.11	2.19	8 ¢
3,000	2.46	2.59	13 ¢
3,500	2.81	2.94	13 ¢
3,700 Avg.	2.95	3.08	13 ¢
4,000	3.16	3.29	13 ¢
5,000	3.86	3.99	13 ¢
7,500	5.48	5.70	22 ¢
10,000	7.00	7.25	25 ¢
15,000	10.05	10.35	30 ¢
20,000	13.10	13.45	35 ¢
30,000	19.20	19.65	45 ¢
50,000	31.40	32.05	65 ¢
100,000	61.90	63.05	$1.15

Specimen Calculation

Bill for Avg. Use of 3,700 cf.

Present		Proposed	
800 cf.	$0.75	700 cf.	$0.75
1,700 cf. @ 8.0¢/C	1.36	2,300 cf. @ 8.0¢/C	1.84
1,200 cf. @ 7.0¢/C	.84	700 cf. @ 7.0¢/C	.49
3,700 cf.	$2.95	3,700 cf.	$3.08

August, 1942

3 United States District Court
for the District of Columbia

No. 17806

LEON HENDERSON, Price Administrator of the Office of Price Administration, *Appellant*,

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ Being the Public Utilities Commission of the District of Columbia, *Appellees*.

Petition of Appeal

Now comes Leon Henderson, Price Administrator of the Office of Price Administration, this 18th day of November, 1942, and files this appeal and states that he is a party affected by the decision and order of the Commission, dated October 13, 1942, (Exhibit A hereto) proposed to be made effective as of September 1, 1942, determining, fixing, and ordering schedules of increased rates and charges for the sale of gas in the City of Washington, District of Columbia, by the Washington Gas Light Company; that prior thereto on August 18, 1942, appellant filed an intervening petition (Exhibit B hereto) before said Commission in this proceeding and on the same day the Commission granted appellant leave to intervene and made appellant a party to said proceeding; that on September 28, 1942, a date prior to said decision and order, appellant filed a petition (Exhibit C hereto) for reopening of the proceeding for the purpose of receiving further evidence, which petition was denied by the Commission by its ruling of September 30, 1942; that subsequent to said decision and order appellant on November 12, 1942, filed a petition for reconsideration (Exhibit D hereto) with the Commission pursuant to paragraph 64 of the Act of March 4, 1913, as amended (D. C. Code, Title 43, Sec. 704; 37 Stat. 988, Chap. 150, Sec. 8; 49 Stat. 882, Chap. 742, Sec. 1), which petition was denied by the Commission by order dated November 16, 1942 (Exhibit E hereto).

Pursuant to paragraph 65 of said Act of March 4, 1913, as amended (D. C. Code, Title 43, Sec. 705; 37 Stat. 989, Chap. 150, Sec. 8; 49 Stat. 882, Chap. 742, Sec. 2), appellant assigns the following reasons for this appeal:

The Commission's decision and order of October 13, 1942, proposed to be made effective as of September 1, 1942, determining, fixing, and ordering schedules of increased rates and charges for the sale of gas by the Washington Gas Light Company is illegal because:

1. Said decision and order is based upon findings of fact which are unreasonable, arbitrary and capricious in that they are not premised upon substantial evidence, and are not and cannot be supported by proper and necessary subsidiary findings, and in that they were made without evidence of and without consideration of present economic conditions.

2. Said decision and order is unreasonable, arbitrary and capricious in that it was entered without consideration of the effect of present economic conditions upon the terms and provisions of the sliding scale arrangement approved by the Commission in its order No. 1458 dated December 13, 1935.

3. Said decision and order is based upon findings of fact which are unreasonable, arbitrary and capricious in that they were made in complete and utter disregard of established and accepted accounting and legal principles, and are contrary thereto.

4. Said decision and order was adopted after a hearing wherein the issues were unnecessarily and unlawfully limited and the scope of the proceeding and the participation of appellant was otherwise restricted, and appellant was denied and refused a full and fair opportunity to be heard.

5. Said decision and order is based upon an erroneous interpretation and construction of the Commission's duty and responsibility to the gas consuming public, and is violative of the Commission's statutory duty to determine, fix, and order just and reasonable rates and charges and no more, and to prohibit unjust and unreasonable and otherwise unlawful rates and charges.

6. Said decision and order was entered without giving the Director of Economic Stabilization the opportunity of timely intervention as contemplated by the Act of October 2, 1942 (Pub. Law 729; 77th Cong., 2d Sess.), amending the Emergency Price Control Act of 1942, and with full knowledge at the time of entry of such decision and order that the Washington Gas Light Company had not complied with the requirements of said Act.

7. Said decision and order determines, fixes and orders schedules of increased rates and charges proposed to be made effective as of September 1, 1942, a date prior to the entry of said decision and order, although the Commission has no statutory authority to make any schedule of rates and charges effective as of a date prior to the approval thereof.

8. Said decision and order is arbitrary, unreasonable and capricious as it is contrary to the program of the Federal government to prevent inflation and to stabilize the cost of living by preventing all future avoidable increases thereof, in that it was entered without a clear and convincing showing that the existing rates and charges were not sufficiently compensatory under present economic conditions or that the Washington Gas Light Company would be subjected to undue hardship if the existing rates and charges were continued in effect.

9. Said decision and order is arbitrary, capricious and unreasonable, and is contrary to the program of the Federal government to prevent inflation and to stabilize the cost of living by preventing all future avoidable increases for it permits an increase in rates notwithstanding the fact that the record before the Commission demonstrates that the existing rates and charges of the Washington Gas Light Company produce at least an adequate return to the Company.

The appellant is aggrieved by said decision and order of October 13, 1942, issued by the Public Utilities Commission of the District of Columbia and files this petition for the purpose of obtaining a review of such decision and order by this honorable Court pursuant to paragraph 65 of the Act

of March 4, 1913, as amended (D. C. Code, Title 43, Sec. 705; 37 Stat. 989, Chap. 150, Sec. 8; 49 Stat. 882, Chap. 742, Sec. 2). The purpose of this proceeding is to prevent the Washington Gas Light Company from effecting the schedules of increased rates and charges which have been determined, fixed, and ordered by said Commission.

The efforts of the appellant to prevent increases in utility rates which constitute an element in the cost of living will be greatly impaired if the said Company is permitted to increase its rates to the consuming public under the principles and terms set forth in the order of October 13, 1942. Such efforts would be impaired and defeated if said Company is allowed to demand and receive such increased rates and charges and the appellant and the consuming public would suffer a substantial and irreparable property loss if they were required to pay such increased rates and charges pending the determination of this appeal.

Wherefore, appellant prays that this honorable Court will:

(a) Specifically order that these proceedings shall operate as a stay of said Commission order of October 13, 1942.

(b) Order that an immediate hearing be held upon the above request for a stay, and fix a date for such hearing not earlier than three days after the date of filing hereof.

(c) Reverse, annul, and set aside said order and determination of said Commission.

(d) Grant such further and different relief as to his honorable Court may seem proper under the circumstances of the case.

LEON HENDERSON,
Price Administrator of the
Office of Price Administration

By DAVID GINSBURG
General Counsel

NATHANIEL L. NATHANSON
Assistant General Counsel

HARRY R. BOOTH
Utilities Counsel

W. RUSSELL GORMAN
Attorney
Legal Division
Office of Price Administration

Acknowledgment of Service

Service of the foregoing "Notice of Appeal" and "Petition of Appeal" acknowledged and a true copy thereof received this 18th day of November, 1942.

Public Utilities Commission
District of Columbia
By E. J. MILLIGAN
Executive Secretary
Public Utilities Commission, D. C.

283 Endorsed: Filed Dec 10 1942 Charles E. Stewart, Clerk

District Court of the United States
for the District of Columbia

No. 17806

LEON HENDERSON Price Administrator of the Office of Price Administration, *Appellant*, Federal Office Building No. 1 Washington, D. C.

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ Being the Public Utilities Commission of the District of Columbia, *Appellees*.

Answer of Washington Gas Light Company

Comes now Washington Gas Light Company (hereinafter referred to as the "Company"), this 10th day of December, 1942, and files this Answer to the Petition of Ap-

peal filed in the above entitled proceeding, and respectfully states as follows:

1. The Company is an interested party in said proceeding in that Order No. 2401 of the Public Utilities Commission of the District of Columbia, dated October 13, 1942 (Exhibit A to the Petition) determined, fixed, and ordered rates, tolls, and charges to be charged by the Company for gas service in the District of Columbia.

2. The Company denies the averment that the Petitioner is a party affected by said decision and order of the Commission dated October 13, 1942.

3. The Company admits the averment that the Petitioner filed an intervening petition with the Commission on August 18, 1942, in Formal Case No. 316, and that the Commission granted the Petitioner Leave to intervene in said proceeding.

284 4. The Company admits the averment that on September 28, 1942, the Petitioner filed a petition with the Commission for a reopening of the proceeding for the purpose of receiving further evidence, and that said petition was denied by the Commission by its ruling of September 30, 1942.

5. The Company admits the averment that the Petitioner filed a petition for reconsideration with said Commission on November 12, 1942, and admits that said petition was denied by the Commission by its Order No. 2423, dated November 16, 1942.

6. The Company denies the averment that the Commission's decision and order of October 13, 1942, is illegal.

7. The Company denies each and every averment set forth in paragraphs numbered 1 to 9 inclusive of the Pefition.

8. The Company denies each and every averment set forth in the last unnumbered paragraph of the Petition, except that the Company states that it is without knowledge or information sufficient to form a belief as to the purposes of the appeal.

9. And for further answer to the Petition, the Company respectfully avers that the Petitioner is not entitled to

prosecute an appeal from said decision and order of the Commission dated October 13, 1942, because the Petitioner does not represent any persons having an interest in the proceeding before the Commission, but is an agency of the Federal Government, charged with the duty of administering the Emergency Price Control Act of 1942. Said Act, approved January 30, 1942, provides: "That nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility * * *" (Sec. 302(c)). That provision remains in the statute to this day, being unchanged by the amendatory Act of October 2, 1942. The Office of Price Administration was created by the Emergency Price Control Act, and the authority, duties, and functions of said Office and of the Price Administrator are defined and limited thereby.

284-1 And having completely answered the averments set forth in said Petition of Appeal, the Company respectfully prays that said Petition of Appeal be dismissed.

The Company moves the Court to dismiss this appeal for the reasons (1) that the Petitioner is not a proper appellant, and (2) that the appeal is without merit.

WASHINGTON GAS LIGHT COMPANY

By STODDARD M. STEVENS, JR.

E. BARRETT PRETTYMAN

C. OSCAR BERRY

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Statutes Involved

Paragraph 18 of the Act (37 Stat. 980, Section 43-317, D. C. Code, 1940) reads as follows:

> "That nothing in this section shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement."

Paragraph 63 of the Act (37 Stat. 988, Section 43-703, D. C. Code, 1940) reads as follows:

> "That all rates, tolls, charges, time and condition of payment thereof, schedules, and joint rates fixed by the commission shall be in force and shall be prima facie reasonable until finally found otherwise in an action brought for that purpose."

Paragraphs 44, 45 and 46 (37 Stat. 984, Sections 43-414, 43-415, 43-416, D. C. Code, 1940) read as follows:

"Par. 44. That whenever the commission shall believe that any rate or charge may be unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same with or without notice."

"Par. 45. That if after making such investigation the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided."

"Par. 46. That notice of the time and place for such hearing shall be given to the public utility and to such other interested persons as the commission shall deem necessary, as provided in paragraph forty of this section, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint."

Paragraph 38 (37 Stat. 983, Section 43-408, D. C. Code, 1940) reads in part as follows:

"That upon its own initiative or upon reasonable complaint made against any public utility * * * the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations or act

complained of shall be entered by the commission without a formal hearing."

Paragraphs 39 and 40 (37 Stat. 983, Sections 43-409 and 43-410, D. C. Code, 1940) read as follows:

"Par. 39. That the commission shall prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided."

"Par. 40. That the commission shall give the public utility and the complainant, if any; ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses."

Paragraph 32 of the Act (37 Stat. 982, Section 43-402, D. C. Code, 1940) reads as follows:

"That the commission shall have power to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it."

Paragraph 65, amended (49 Stat. 882, Section 43-705, D. C. Code, 1940), provides that any public utility, or any other person or corporation affected by any final order or decision of the Commission, may appeal to the District Court of the United States for the District of Columbia, and reads in part as follows:

"Any such appeal shall be heard upon the record before the Commission, and no new or additional

evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

"Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

"Any party, including said Commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case."

The Emergency Price Control Act of 1942 (Public Law 421, 77th Congress) specifically provides in Section 302(c):

"* * * That nothing in this Act shall be construed to authorize the regulation of * * *(2) rates charged by any common carrier or other public utility, * * *."

The Act of October 2, 1942 (Public Law 729, 77th Congress), amending the Emergency Price Control Act, reads in part as follows:

(Sec. 1) "* * * *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

"SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of section 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."

Section 7 (c) reads as follows:

"(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act."

Order No. 2219, authorizing the investigation, reads as follows (caption omitted) (R. 281 in No. 8504):

"By the Commission: A sliding scale arrangement for fixing rates of the Washington Gas Light Company was established by Order No. 1458 of the Commission (Findings Nos. 1 and 2). Under the arrangement rates are to be adjusted as of September 1st of each year.

"IT IS ORDERED:

"Section 1. That an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding scale arrangement.

"Section 2. Notice is hereby given of the intention of the Commission to hold a public hearing on the subject matter of the investigations."

The notice of hearing dated July 21, 1942, reads as follows (caption omitted) (R. 282 in No. 8504):

"Notice is hereby given that the Public Utilities Commission of the District of Columbia will hold a formal public hearing on Tuesday, August 18, 1942, at 10:00 a. m., in Room 500, District Building, relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458."

Rule 7.3 and Rule 7.5 of the Tentative Rules of Practice and Procedure Before The Public Utilities Commission read as follows:

"RULE 7.3. *Action on Petition.* The Commission may grant or deny a petition for leave to intervene,

or may grant the petition upon such conditions and limitations as it may prescribe."

* * *

"RULE 7.5. *Effect on Issues.* The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargment is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

The Findings and Opinion of the Commission (R. 10-23 in No. 8504) (omitting the caption) read as follows:

NATURE OF PROCEEDING

This is a proceeding involving the usual annual determination of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company pursuant to the provisions of the sliding scale arrangement established by Order No. 1458, dated December 13, 1935.

The sliding scale arrangement provides that prior to the beginning of each rate year (defined as the twelve months' period from September 1 to August 31, inclusive) this Commission shall determine after public notice and opportunity for hearing:

(1) An amount to be applied for the decrease or increase of rates to be effective during the said rate year, and

(2) A schedule of rates, rules, and regulations accomplishing such decrease or increase.

On March 20, 1942 (Order No. 2219), the Commission ordered that an investigation be made, and on July 21, 1942, the Commission set the matter for hearing. Hearings were

held on August 18 and 19, 1942, and on September 4, 11, 14, and 30, 1942.

The rates in effect during the last test year (the twelve months' period ended June 30, 1942) were those established by Order No. 1921, effective as of September 1, 1940. These rates were based upon the operating experience of the Company for the test year July 1, 1939, to June 30, 1940.

During the present proceeding, we indicated that our responsibilities are twofold. In the first place, it is the duty of this Commission to determine, in accordance with the provisions of the sliding scale arrangement as such arrangement is now constituted, whether the Washington Gas Light Company is entitled to an increase in rates for the year commencing September 1, 1942, and the amount of such warranted increase. This responsibility is so clearcut that to ignore it would constitute an evasion of our duty and would be a serious reflection upon the ability of this Commission to cope with its problems in a fair and impartial manner.

Secondly, having made this determination, it is our duty to give recognition to existing conditions and the bearing of such conditions upon the question before us. In additon to the present economic situation, which admittedly is of vital importance, we must also consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia.

At the commencement of hearing in this proceeding, August 18, 1942, the Office of Price Administration, through H. R. Booth, its Utilities Counsel, filed with this Commission its petition for leave to intervene. This petition was granted, and Counsel for the Office of Price Administration attended all the hearings and submitted briefs.

Exhibits were presented by the Commission's Chief Accountant and Chief Engineer reflecting the results of their investigations, which extended over a period of several months. The Chief Engineer's testimony related to the allocation of the

rate base to service outside the District of Columbia. The Chief Accountant testified that computations in accordance with the sliding scale arrangement indicated that the Company was entitled to a rate increase of $324,718.06. The Company's computation indicated a rate increase of $381,597. The difference between the two amounts is occasioned entirely by certain adjustments to operating expenses and taxes and those required under Section 6 of the sliding scale arrangement made by the Commission's witness but protested by the Company.

Careful study has been given to all factors having a bearing upon these problems in arriving at the decisions hereinafter set forth.

STAFF ADJUSTMENTS

Payment to the Greater National Capital Committee

The question involved is whether or not the payment made by the Company is in the nature of a contribution or a sales promotion expense. The Greater National Capital Committee is an arm of the Washington Board of Trade, and its chief function is to attract visitors to the Nation's Capital. The principal means employed is that of inducing the holding of conventions in Washington. In Formal Cases 292 and 304 the Commission held that the benefits derived by the Washington Gas Light Company from this expenditure were of such a conjectural nature that it must be viewed as a donation to a worthy civic organization rather than a sales promotion expense as the latter term is ordinarily defined. We, likewise, hold this view and find further that in view of the present overcrowded condition of the city due to the war effort there is even less justification for such an expense. The amount in controversy, $88.85, stated by the Company as being a token payment for purposes of Commission ruling, should therefore be disallowed as an operating expense for rate-making purposes.

10a

Sales Promotion Expense

This issue arises by reason of the Commission's requirement that the Merchandising and Jobbing activities of the Company be segregated from its principal business of furnishing gas service and relates to the allocation of certain expenses applicable to both the sale of gas and the sale of appliances, namely the salaries paid retail salesmen and the cost of advertising appliances.

The Sales Promotion Department of the Company is composed of several divisions, and the salaries of the retail salesmen constitute only about 25% of the total salesmen's salaries. The remaining 75% covers wholesale and promotional salesmen who ordinarily are not engaged in the sale of appliances and therefore receive little or no commission. The retail salesmen are paid comparatively small salaries plus commissions on appliance sales. The commissions are paid not only on appliances sold by the Gas Company, but upon appliances sold by other dealers when such sales result from the efforts of the Gas Company's salesmen. In accounting for the salaries and commissions paid the retail salesmen, their entire salaries and the commissions paid on appliance sales by other dealers are charged to Sales Promotion Expenses, while commissions paid on appliances sold directly by the Gas Company are charged to Merchandising and Jobbing Expense. The Company contends that this practice is proper for the reason that it represents an allocation based upon the time of the retail salesman devoted to extolling the virtues of gas as a fuel and the actual sale of appliances. The Company cites the fact that on the average the salesmen close only one sale out of fifteen calls. The Commission's witness contends that the salaries paid these salesmen represent additional compensation for the selling of appliances, and such salaries should be accounted for in the same manner as the commissions—that is, upon the ratio of commissions paid on appliances sold by the Company to the total commissions paid.

The compensation of the retail salesman depends in major art on the sale of appliances, and it is therefore obvious that is major efforts are devoted to the selling of appliances. It ollows that the compensation paid these salesmen, whether it e in the form of commissions or salaries, is assignable to ales Promotion Expense and Merchandising and Jobbing on he basis of results produced, and since this is the method used y the Commission's witness, we think the adjustment is roper.

On the second item, of appliance advertising, the Company ontends that 80% of such advertising is a proper promotional xpense, whereas the Commission's witness has recommended hat only 50% of such expense be allowed. The only support or the 80% allocation advanced by the Company was the udgment of their Sales Manager, and the ratio of appliance ales by the Company to sales made by other dealers. The llocation made by the Commission's witness is based upon the ractice of the Company of paying, under certain conditions, 0% of the cost of advertising gas appliances by other dealers. n view of the Commission's requirements that the appliance usiness of the Company be segregated entirely from its gas usiness, the Merchandising and Jobbing activities of the Com- any must be viewed in the light of the relations of the Com- any with any other appliance dealer. The appliance or gen- ral advertising of the Company for the test year under con- ideration constituted only about 11% of the total advertising, he remainder being characterized as institutional advertising. The adjustment proposed by the Commission's witness relates nly to the former. The fact that the Company segregates ap- liance advertising from its other or institutional advertising ight of itself be sufficient grounds for saying that all of such dvertising relates entirely to the Merchandising Activities of he Company. However, in view of the practice of participat- ng in advertising campaigns of other dealers we will go no urther than the adjustment made by the Commission's wit- ess.

We hold that the aggregate adjustment of $26,824.75 applicable to the items discussed above is proper.

Expense of Financing

The Commission's witness excluded from operating expense certain costs incident to increasing the authorized capital stock of the Company, on the grounds that they pertain only to the securing of new capital and as such are properly chargeable to capital stock expense when and if the stock is issued. The Company contends that these expenditures should be permitted in operating expenses for the reason that, through no fault of the Company, the Commission was not organized and able to give the approval necessary when the stock in question ($4.25 preferred) could have been sold advantageously. We sympathize with the Company's position, but in view of the requirements of the classification of accounts and the nature of the items in question, and due further to the fact that the consumers likewise were not at fault, we cannot depart from proper accounting and therefore hold that the adjustments made by the Commission's witness, aggregating $3,256.67, are proper.

Payment to U. S. O.

The Commission's witness excluded from operating expense a payment of $1,250.00 to the U. S. O. on the grounds that such payment was a donation not necessary in the furnishing of gas service and as such properly includible in Account 538—Miscellaneous Income Deductions. The Company contends that this is not an ordinary donation, inasmuch as the U. S. O. is a war project backed by the Federal Government and that the morale and behavior of the armed forces are of vital concern to the Company and to all citizens. We agree, of course, that the U. S. O. is a necessary organization in the conduct of the war effort, but we cannot agree that the donation made by the Company is different from other donations to worthy causes. The customers of the Company are called

upon for direct donations to this organization, and they should not be called upon for a further donation in the form of increased rates for gas service. We, therefore, approve the adjustment as made by the staff.

Excess Profits Tax

The Commission's witness eliminated the excess profits tax paid for the year 1941 after adjustment for the effect of such elimination on normal taxes because of the possible future adverse effect upon consumers with little material benefit to the Company. The Company contends that it would not have been liable for excess profits tax if the Commission had been in a position to act expeditiously on its application for authority to issue $4.25 preferred stock in 1941 and that the Company had no "excess" profits in the popular sense of the word. We recognize the equity of this contention. However, we cannot overlook the fact that the recognition of excess profits tax as a proper element in the determination of rates for service under the rates of taxation presently proposed in the pending Revenue Act for 1942 would result in a continuing cycle of rate increases severely penalizing the consumer without materially benefiting the Company. We are of the opinion that as a general proposition, excess profits taxes under existing conditions should not be considered in the determination of rates. Therefore, the adjustment of $43,928.02 to eliminate this item is approved.

Section 6 Adjustment

This item relates to the adjustment under Section 6[1] of

[1] If, at any Adjustment Date, it appears that the operating expenses of the Companies for the Test Year were increased or decreased by reason of change in the rates for production labor, the unit price of natural gas, the delivered unit price of other fuels, or taxes, and the aggregate amount attributable to such change during the Test Year for any or each of the above enumerated items exceeds 5 per centum of the aggregate amount of any such item for the Test Year, then there shall be an adjustment in the Amount Available for Return equal to the effect of such change in unit costs for the entire year.

Order No. 1458 on account of the increase in the price of fuel. In making this adjustment the Company has used the inventory cost of fuel as of June 30, whereas the Commission's witness has used such cost as of May 31. The Commission's witness contends that since the operating expenses of the Company were not affected by the average cost of fuel as of June 30, 1942, the use of such cost would be contrary to the provisions of Section 6. The Company contends that the unit cost of fuel as of June 30 should be used, on the theory that the purpose of Section 6 is to provide for known increased costs. It is clear that the intent of Section 6 is to allow certain adjustments for increased costs, but it is equally clear that there is a definite limitation on the method of determining the amount of the adjustment. If we were to apply the purpose of Section 6 indiscriminately there is no doubt that other adjustments would be necessary, some upward and some downward. We think that a departure from the specific provisions of Section 6 would not be warranted, and even though it is recognized that the purpose of Section 6 is to provide for increased costs, we hold that the adjustment made by the Commission's witness is in accord with the specific provisions of Section 6 and that the disputed difference of $3,294.63 should not be considered in the determination of amount available for increase of rates.

OPERATING EXPENSES

In addition to the adjustments made by the witness for the Commission, Commissioner Hankin raised several questions relating to the propriety of certain operating expenses.[2] On these questions we have the following opinion and conclusion.

Order No. 1458, which established the sliding scale arrangement, provides that the Commission shall determine the net amount available for return for each test year by deducting from the gross operating revenue of the Company the ad-

[2] Three items aggregating $90 were conceded by the Company because of the insignificance of the amount, and adjustment has been made therefor.

justed operating expenses for the test year, the accruals for retirement reserve, reasonable accruals for uncollectible bills, and reasonable accrual for taxes.

The order further provides that the operating expenses of the Company shall be adjusted for any accounting departures[3] during the test year; for over or under accruals in taxes, uncollectible bills, and such other accrued accounts for which adjustment is provided by the prevailing accounting classification; and to exclude those expenses allocated to gas service outside of the District of Columbia.

Thus the sliding scale arrangement does not attempt to define operating expenses or to indicate that certain types of operating expenses should be excluded in determining the net amount available for return, beyond the adjustments described above. The sliding scale arrangement, however, does clearly indicate that operating expenses should be determined in accordance with the prevailing accounting classification.

On January 11, 1940 (Order No. 1846), this Commission prescribed for use by the Washington Gas Light Company the Federal Power Commission Uniform System of Accounts prescribed for Natural Gas Companies subject to the Provisions of The Natural Gas Act, with certain modifications to permit the continuance of the sliding scale arrangement. This system of accounts states the purpose of the operating expense accounts to be as follows:

> "The operating expense accounts (701 to 809) are designed to show in detail the cost (except depreciation, amortization and depletion, certain property losses, and taxes) of furnishing gas utility service."

It follows, therefore, that if the operating expenses of the Company are recorded in accordance with the prevailing Uniform System of Accounts the function of the Commission is to

[3] "Accounting departure" means a departure, not resulting solely from the exercise of judgment, from the correct application of the accounting classification and interpretations prescribed by the Commission, not in conflict with the sliding scale arrangement, prevailing at the date of such entry.

determine whether or not the expenses so recorded are reasonable. Obviously, the Commission itself cannot, collectively or individually, review the books of the Company to make a determination as to the reasonableness of every item and must depend upon its staff to call attention to those that appear questionable. This the staff has done, and we have herein expressed our opinion relative to such items. We find that the operating expenses of the Company for the test year ended June 30, 1942, excepting the adjustments heretofore discussed, have been recorded in accordance with the Uniform System of Accounts prescribed by this Commission and that such expenses are fair and reasonable and properly considered in the determination of rates under the sliding scale arrangement.

FEDERAL INCOME AND EXCESS PROFITS TAXES

The computations of the net amount available for rate increase presented by both the Company and the Commission's witness included accruals for Federal income taxes at the rate of 40% for the last six months of the test year under consideration (January 1, 1942, to June 30, 1942), in accordance with that provision of the sliding scale arrangement which provides for a reasonable accrual of taxes. For the first six months of such test year (July 1, 1941, to December 31, 1941), this same rate was applied in accordance with the provisions of Section 6 of the sliding scale arrangement.

However, present-day conditions compel us to consider whether accruals for Federal income taxes, at rates considerably higher than rates in effect in previous years, should be allowed in their entirety for rate-making purposes. Much has been said recently regarding the allowance of Federal income taxes on a normal-year basis rather than on the basis prevailing in a so-called "abnormal year." Our difficulty here lies in the necessity for making a distinction between normal and abnormal taxes. It is true that rates of taxation imposed during the year 1941 and proposed for the year 1942 are sub-

stantially in excess of rates imposed in prior years. However, it requires very little imagination to foresee that the proposed rate for 1942, while such rate is abnormal as compared with the rates in effect in prior years, may well be a normal or even a subnormal rate for some years to come. After weighing all factors to the best of our ability, we conclude that for the purpose of determining the amount available for rate increase for the rate year beginning September 1, 1942, the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable. Such a calculation will result in a further decrease of $115,863.09 in adjusted operating expenses and will eliminate the adjustment of $4,929.39 to provide for increase in taxes under the provisions of Section 6 of the sliding scale arrangement.

With respect to excess profits taxes, we are of the opinion that no increase in rates should be predicated upon the liability of a utility for excess profits taxes. For this reason we have disallowed as an operating expense for the test year ended June 30, 1942 the excess profits tax of $43,928.02, in order to prevent the direct inflationary effect which such allowance would invite.

The record indicates that the Company will not be liable for excess profits tax for the year 1942. However, to guard against the possibility that any increase in rates might result in the imposition upon the Company of liability for excess profits taxes on revenue derived from such rate increase, we requested the Company to propose a protective arrangement which would obviate such a possibility. The arrangement proposed by the Company, which in our opinion will achieve the desired result, is set forth below:

> "In the event such increased rates would result in the payment of excess profits taxes by the Washington Gas Light Company, any portion of the amount derived from the increased rates hereinafter authorized, which, if retained by the Company would be

subject to excess profits tax, shall be recorded in a specially provided deferred credit account. The amount derived from increased rates shall be deemed to be 2.28% of the amount billed for sales of gas subsequent to the effective date of this order. The above stated percent is the ratio of the increase authorized herein to the total sales of gas for the test year ended June 30, 1942, calculated at the rates hereinafter authorized.

"The amount recorded in the deferred credit account as of December 31, 1942, and as of December 31st of each year thereafter so long as this order shall remain in effect, shall be returned to the gas customers in the District of Columbia by appropriate deductions from gas bills rendered to such customers as soon after December 31st as practicable. The amount of individual refunds shall be determined by ascertaining, by classes of service, the relation of the amount refundable to the total amount billed during the month of December and applying such percentage to each customer's December bill. Refunds so determined shall be shown as credits on customers' bills as soon after December 31st as practicable. In the event the amount recorded in the deferred credit account as of December 31st is less than $10,000, such amount shall be treated as operating revenue."

FINANCIAL POSITION OF COMPANY

There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of expending its plant to meet the growing demands for gas service. We must weigh the necessity for an increase in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The District of Columbia has been characterized as the No. 1 defense area of the United States, and

it is vital that the Company be in a position at all times to provide adequate service.

It is a matter of record that the Company recently attempted to sell 40,000 shares of $5.00 cumulative preferred stock, but was successful only to the extent of being able to sell 18,206 shares of this stock. This was due to a number of factors, and a recitation of events and facts preceding and subsequent to the offering of this stock shows that the financial position of the Company merits our most serious consideration.

On January 17, 1941, the Company filed an application with this Commission for authority to increase its capitalization by 90,000 shares of $4.25 preferred stock. Due principally to the lack of a quorum on the Commission this application was not acted upon until March 26, 1942 (Order No. 2221). At that time, due to depressed market conditions, the Company was unable to sell this newly created stock and endeavored to sell 40,000 shares of its $5.00 cumulative preferred stock with the result heretofore stated. In approving the sale of the $5.00 stock the Commission considered, among other factors, the financial position of the Company as of December 31, 1941. At that time income deductions and preferred dividends were earned 1.88 times, and the earnings per share of common stock were $2.24. Our order was issued April 21, 1942, and income for the twelve months ended April 30, 1942, showed that income deductions and preferred dividend coverage had declined to 1.75 times, while earnings per share of common had declined to $1.96. For the twelve months ended July 31, 1942, the former figure had declined to 1.67 times and the latter to $1.80. This decline in income is not due entirely to increased provision for Federal income taxes. Substantial increases in the cost of labor and material have occurred during the period under discussion, and such increases have been provided for only in part in the determination of the amount available for rate increase. Labor costs included in operating expenses for the test year under consideration exceed labor costs for the prior test year by more than $300,000, a part of

which was attributable to the increased volume of business.

INCREASE IN RATES WARRANTED

After careful consideration of all factors having a bearing on this case, including the fact that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding scale arrangement, we are of the opinion that, after making the adjustments hereinbefore approved, the amount available for increase in rates under the sliding scale arrangement for the rate year beginning September 1, 1942 is $201,424.74.

This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure.

The amount of $201,424.74 was determined as follows:

Adjusted Operating Revenues		$8,918,656.27
Adjusted Operating Expenses		7,301,988.67
Net amount available for return prior to adjustment allowed under Section 6 of Order No. 1458		$1,616,667.60
Adjustment under Section 6 of Order No. 1458		
Production Labor	$20,043.06	
Production Fuels	41,572.89	
		(61,615.95)
Adjusted amount available for return		$1,555,051.65
Return allowed (6½% of Rate Base of $28,088,322.57)		1,825,740.97
Deficiency in return		270,689.32
Amount available for rate increase for rate year beginning September 1, 1942 (75% of Deficiency)		203,016.99
Less: Undistributed portion of amount available for reduction of rates for rate year beginning September 1, 1940		(1,592.25)
Net amount available for rate increase		$ 201,424.74

It will be noted that the final conclusion as to the net amount available for increase in rates is $123,293.32 less than the amount determined by the Commission's staff. This difference is due to the elimination from operating expenses of the $90.00 conceded by the Company (see Footnote 2—Page 7) and to the computation of the accrual for Federal Income Taxes at 31% rather than 40%.

DISPOSITION OF AMOUNT AVAILABLE FOR INCREASED RATES

The Company presented revised rate schedules which would increase its annual revenues by $357,500. This amount is $156,075 in excess of the amount that we have concluded is available for rate increase. The staff of the Commission has prepared new rate schedules providing increased annual revenue of $200,141, to be apportioned among the different classes of consumers as follows:

Residential	$ 53,429
Commercial	35,908
Domestic Space Heating	101,208
Commercial Space Heating	6,387
Seasonal Off Peak	218
Wholesale Apartment House	2,991
	$200,141

The difference of $1,283.74 between the above amount and the amount found available for rate increase will be held available for future rate increase.

The rate schedules presented by the Company eliminated the present separate schedule for space heating, proposing to include future consumption for that purpose along with regular domestic or commercial use. This will eliminate the necessity of maintaining two separate meters on premises using gas for both space heating and domestic or commercial purposes. We

conclude that, in view of a possible meter shortage, the elimination of the separate space heating schedule is warranted, and the schedule submitted by the Commission's staff have been prepared on this basis. We further conclude that the apportionment of the $200,141 as the amount available for increase in rates is fair and equitable.

EFFECT OF INCREASED RATES

The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase. Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating customer's bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year.

The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only about 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies.

CONCLUSIONS AND FINDINGS

We conclude and find as follows:

(1) That the rate base for determining rates to be charged by the Washington Gas Light Company under the sliding scale arrangement for the twelve-month period beginning September 1, 1942, is $28,088,322.57, including working capital of $1,172,656.02, $597,044.81 of which is for cash working capital and $575,611.21 for materials and supplies.

(2) That gross operating revenues during the test year ended June 30, 1942 amounted to $8,918,656.27; that adjusted operating expenses including taxes amounted to $7,301,988.67; that the adjustments providing for increase in certain operating costs in accordance with Section 6 of Order No. 1458 amount to $61,615.95; that the amount available for return is $1,555,051.65; that the amount to be reflected in increased rates for the rate year beginning September 1, 1942, after considering $1,592.25 remaining from the amount available for rate decreases authorized by Order No. 1921 dated August 23, 1940, is $201,424.74.

(3) That the amount of $201,424.74 should be distributed: $53,429 to Schedule "A," $101,208 to domestic space heating customers formerly served under Schedule "B" who will hereafter be served under Schedule "A," $35,908 to Schedule "C," $6,387 to commercial space heating customers formerly served under Schedule "B" who will hereafter be served under Schedule "C," $218 to Schedule "E," $2,991 to Schedule "F," and $1,283.74 to subsequent years' rate adjustment.

An appropriate order will issue.

By the Commission (Chairman Flanagan and Commissioner Kutz). Commissioner Hankin dissents for the reasons stated in the accompanying dissenting opinion.

E. J. MILLIGAN,
Executive Secretary.

October 13, 1942

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Public Utilities Commission of the District of Columbia

P. U. C. No. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

Commissioner HANKIN, dissenting: [1]

I dissent from the opinion and order of the Commission on four main grounds:

(1) The order of the Commission is in utter disregard of, and contrary to, the Act of October 2, 1942, amending the Price Control Act;

(2) In this proceeding, the Commission has so far departed from the usual course of administrative proceeding, and has so disregarded the rules of proper procedure, that it deprived the public of a full and fair hearing;

(3) The Commission's determination that the Washington Gas Light Company is entitled to an increase in rates is

[1] Since the Commission decided to issue its opinion and order without giving me any reasonable time in which to write my dissenting opinion, I filed a draft of my dissent under protest, reserving the right to substitute an opinion in more finished form.

In order not to delay the decision in this case, I was preparing a draft of an opinion, when on Friday, October 9th, I received the first draft of the majority opinion. This required changes in my draft. On October 12th, I received a second draft of the majority opinion containing many changes. On October 13th, for the first time, I was handed a copy of the Commission's order, making the rates retroactive to September 1st. On the same day, I was informed by the majority, that the majority opinion and order would be issued immediately, without giving me an opportunity to complete my dissenting opinion. I, therefore, hurriedly whipped my draft into shape, but had no opportunity to answer many points raised in the majority opinion, and had no opportunity to support my opinion by adequate citations of authorities. This I intended to do in my final dissenting opinion.

Upon careful reading of the majority opinion I find that little need be done to answer it. I feel that my opinion should be annotated by ample citations of authorities. Under the circumstances, however, I am filing this revised copy of my dissent without the necessary number of citations.

based upon errors in the sliding-scale arrangement and upon conclusions unsupported by the evidence in the record;

(4) With proper application of the sliding-scale arrangement, and in the light of such other facts as are pertinent to this case, the present rates should be decreased by the sum of $617,874.36.

The Price Stabilization Act

On October 2, 1942, Congress passed an Act to amend the Emergency Price Control Act of 1942, in which it was provided:

> That no common carrier or other public utility shall make any general increase in its rates or charges *which were in effect on September 15, 1942*, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. [Italics supplied.]

On October 3, 1942, the President issued an Executive order in which he designated the Director of Economic Stabilization as the agency to receive notice pursuant to the above provision.

This Commission now issues an *order*, in which it is provided in Section 2: "That the rates, tolls, and charges *to be charged* by the Washington Gas Light Company for gas service in the District of Columbia *shall be* in accordance with the following rates, tolls, charges, tariffs, rules, regulations, and conditions of service." The rates prescribed in this order are higher than those which were in effect in the District of Columbia on September 15th, last. This order is thus contrary to an express Act of Congress.

The fact that the Office of Price Administration had intervened in this case is in no manner sufficient compliance with this Act of Congress. The history of this legislation indicates that Congress was quite well aware of the fact that the Office of Price Administration had intervened in this case. It was a matter of common knowledge, of which Congress must have taken legislative notice, that the intervention of the Office of Price Administration was beset by all types of limitations

APPENDIX TO BRIEF FOR APPELLEES JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, AND PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, IN NOS. 8501, 8502, 8503, AND 8504

Part I

PLEADINGS AND OTHER PAPERS DESIGNATED BY APPELLEE BYRNES

in the prosecution of this case. Nevertheless, Congress enacted this statute, and a reasonable inference is that the agency designated by the President would have the right to appear before this Commission and present such facts as he may deem advisable pertaining to all matters which are involved in rate making. Therefore, the fact that an agency of the Federal Government had already participated in the hearing in this case in no way absolves this Commission from its duty of holding up any order increasing rates until the Director of Economic Stabilization will have had his thirty days' notice and an opportunity to intervene.

In Section 3 of its order, the Commission also prescribes that "under the terms of the sliding scale arrangement, the rates, tolls, charges, rules, regulations, and conditions of service herein prescribed *became effective as of September 1, 1942.*" If, by this, it is intended to make the order retroactive so that the rates might be said to have been in effect on September 15, 1942, the violation of the statute is so much the worse. The Commission thus provides the Company with a means of evading the law. To me this is shocking, although not surprising in view of other circumstances attending this case, as will appear from this opinion.

The Nature of the Proceeding

This is an annual rate hearing under the sliding-scale arrangement with the Washington Gas Light Company, instituted in 1935. In utility and Commission circles it is generally referred to as a routine hearing. The Commission's accountants audit the books of the Company, pick out a few small items for suspension, a hearing is held on these few items, and a mathematical formula is applied fixing the rates for the next year. If any substantial questions arise, they are either kept "pending" [2] or are set aside as being not within the "scope" of the hearing.

[2] The order of investigation, instituting the 1941 proceeding under the sliding scale, provided: "Section 2. That an investigation be made relative to the rate of return to be allowed the Washington Gas Light Company on its property used and useful for the convenience of the public." Although that was part of the investigation for the purpose of setting the rates for

Prior to the hearing in this case, which was set for August 18, 1942, the Commission and the Company had a prehearing conference on August 14th. At this conference the Commission's staff raised questions as to a number of relatively small items, and I also raised a number of questions. The latter questions related to the rate base and various items included in "operating expense."[3] Immediately, the Company took the position that, if such major questions were to be considered, the Company would not be prepared for the hearing set on August 18th. It stated that it would require some sixty days in which to prepare for the hearing. The Commission was also unprepared to go into these major questions. As the then Chairman of the Commission,[4] I granted a continuance of sixty days and nothing to the contrary was stated by either of the other Commissioners who were present. On the following day, however, the Commission, for reasons inexplicable to me, but now quite understandable, decided that the hearing was to take place on August 18th, although neither side was prepared to go into the important questions which will be treated in this opinion.

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the period of September 1, 1941, to August 31, 1942, the subject of the rate of the return was not touched upon at the hearing. The only issue at the hearing was an item of about $1,200 contributed by the Washington Gas Light Company to the Greater National Capital Committee. It is explained that the question pertaining to the rate of return is still one of the items "pending investigation," although nothing whatever has been done by the Commission or its staff by way of "investigating."

[3] The questions I raised were by no means the result of a careful analysis of the data. They were merely the result of a cursory review of the exhibits prepared by the accounting staff. The first glimpse any of the Commissioners had into the figures relating to the proceeding was on August 13th, the day before the prehearing conference. Prior to this date, none of the elements which entered into the rate determination had been discussed by the Commissioners, either among themselves or with the staff, except the item of "Salaries of Officers and Executives," when several months before a question was raised why this item was omitted from the Commission's annual reports, as is required by our statute.

[4] Three days later, the other two Commissioners elected Commissioner Flanagan as Chairman, as of September 1, 1942. This explains why the first part of the hearing was conducted under my Chairmanship, and the latter part under Commissioner Flanagan's Chairmanship; also the reference to Commissioner Flanagan throughout this opinion as the "present Chairman."

It has been intimated by the Company in the course of the hearing, as also by the press in both the news and editorial columns, that it was "unfair" to raise these major questions at a time when the Company was applying for an increase in rates under the sliding-scale plan, after a number of reductions in rates had been effected through this plan in the previous years.[5] The argument resolved itself into a complaint that the sliding-scale plan should work "both ways," and the impression given was that these major questions were raised in order to avoid an increase under the sliding-scale plan. The complaint against my raising the major questions, however, was merely a smoke-screen to hide the real issues involved under the sliding-scale plan itself. The same questions would have been raised, had the computation shown that the rate payers were entitled to another reduction in rates this year. If there is any "unfairness," it lies not in my having raised these questions, but in the fact that these questions had not been raised in previous years. There is no telling by how much the rates should have been reduced, had these questions been raised and properly determined.

The Company has also intimated that, if questions of a major character were to be raised, it should be given an opportunity to terminate its "agreement" to be bound by the sliding-scale plan upon ninety days' notice, in accordance with Finding No. 3, Order No. 1458, issued December 13, 1935, which embodied the sliding-scale arrangement.

The Company's understanding of its "rights" under the sliding-scale arrangement is entirely erroneous. It treats of the arrangement as an "agreement" between the Commission and the Company. "We have an agreement with the Commission and we simply come in, together with the Commission's staff, and say the figures under the sliding-scale arrangement which has been established by the Commission results in so and so; that is all there is to it," says Counsel for the Company. Yet, the sliding-scale arrangement lacks all elements of an agreement. It was not an agreement entered into by the

[5] The total reductions in rates, since the adoption of the sliding-scale plan amounted to $328,000; the rate increase sought by the Company this year is over $381,600.

parties concerned, but an *order*, in which the Commission set for itself a formula to follow in future rate determinations. True, the sliding-scale arrangement was an order in which the Company acquiesced. This order, however, like any order of the Commission, is subject to modification or termination by the Commission.

Section 1 of this order adopted the initial rates, rules, and regulations under the sliding-scale arrangement, and Section 2 provided that subsequent rates should be in accordance with the sliding-scale arrangement, or may be modified or changed *in accordance with law, and in conformity with Finding No. 3*. Assuming that the Commissioners could in 1935 thus bind either themselves or their successors as to the manner in which rates should be determined, there is nothing in these provisions which in any way diminishes the duty of the Commission to examine all elements of rate making in any rate proceeding. The effect of the above provisions is simply that changes in the arrangement should be made upon ninety days' notice, with or without prior hearing. There is nothing in these provisions which indicates that the Commission may not at any time investigate and ascertain the facts, whether finally it will or will not terminate or modify the arrangement. Assuming further, that there is anything *in this arrangement* which would absolve the Commission from its duty to determine the facts relating to all elements which enter into rate making, then this order must be held contrary to Paragraph 18 of our statute, which provides, *inter alia* that "the right to alter or amend *all orders* relative thereto is reserved and vested in the Commission, notwithstanding any such arrangement and mutual agreement".[6] Thus, if looking to the four corners of the

[6] "PAR. 18. That nothing in this section shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be

sliding-scale arrangement itself, there is still question as to the right of the Commission to modify or terminate, the provision of Paragraph 18 of the statute is conclusive in this regard.

In view of the above, there is no merit to the Company's contention that major questions relating to the elements of rate making cannot be raised, unless the sliding-scale arrangement is terminated upon ninety days' notice.

However, the argument that the Company should be given an opportunity to terminate the sliding-scale arrangement lacks candor, for, at the same time, the Company argued vigorously that it needed the sliding-scale arrangement; that the Company was in the process of seeking credit through the sale of preferred stock and bonds; and that the sliding-scale arrangement was a "distinct advantage." "The Company must have credit; we have got to have money," Counsel for the Company insisted. That the sliding scale, as it now operates, is a "distinct advantage" to the Company, there is no doubt. But the Company's contention only means that it must continue charging rates which otherwise might be deemed excessive simply because it is in need of additional capital. I do not think that the rate payer, whose payments are based on the entire rate base, not merely on the equity of the common stockholders, should be charged with the Company's costs of financing.

In the course of the hearing, the present Chairman emphasized that this case involves the "fairness" and "integrity" of the Commission.[1] With this I am thoroughly in accord. I should go further and say that *every* case before the Commission involves its fairness and integrity. By this I understand that the Commission must "fairly" determine all elements of fact, and must apply the law to the end that the interests *of the public and of the utility* might be fully pro-

necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement."

[1] The majority opinion also stresses the "fairness" and "integrity" of the Commission. Fairness and integrity should at all times be assumed.

tected. "Fairness" does not mean the blind application of a mathematical formula, without a thorough examination of the facts; "integrity" does not mean that facts should not be scrutinized, merely because they had not been scrutinized before.

It is not sufficient to make such self-serving declarations as "careful study has been given to all factors," and, at the same time, shift the entire responsibility on the staff for whatever items are called to the Commission's attention. No matter how able the staff, the responsibility is ours. It is a well-known fact that the care which will be exercised by able accountants in bringing out questionable items will generally reflect the policies of the Commission. If substantial items have been overlooked, or if the accountants merely adopt the explanations of the Company on borderline questions, the fault is not theirs, but ours. We cannot arrive at a "fair" determination of fact, when the testimony is at war with reality, merely because "the Commission cannot, collectively or individually, review the books of the Company to make a determination as to the reasonableness of every item." The requirements of "fairness" and "integrity" are not thus easily satisfied.

The Commission also adopted the Company's claim that it is in need of financing, elaborated on the proposition, and concluded that it "must weigh the necessity for an increase in rates against the broad problem of adequate service." The facts in the record do not bear out any immediate danger to the rendition of adequate service by the Gas Company on account of difficulties in financing. The records in the cases involving applications for the issuance of preferred stock show that the Washington Gas Light Company is a holding company of gas companies in nearby Maryland and Virginia, and the Company's need for financing is occasioned to a large extent by the need for expanding its plant to meet the growing demands for service outside of the District of Columbia. Had the Company's return been computed solely on the equity of the common stockholders, with allowances for interest and fixed charges, there might have been room for the argument that an additional allowance should be made to attract new

capital; not so, however, where the Company is allowed a return not only on the stockholder's own investment, but also on the investment represented by other people's money, so that the common stockholder receives a return of 10% on the market value of the stock. In such circumstances, to increase rates in order to attract additional investment would mean to charge the public with the cost of financing; in this case, it would mean to charge the District consumers with the cost of financing not only in the District of Columbia, but also in other jurisdictions. Such charges, in addition to a fair return on the property used and useful in the service within our jurisdiction, are bound to result in unreasonably excessive rates.

Our statute requires that the rates charged by any utility shall at all times be just and reasonable, and we must follow this precept laid down by the law. When we prescribe rates, whether that be under the sliding-scale plan or any other plan, we must bear in mind that we are fixing rates the people must pay for services which they cannot get elsewhere. It behooves us, therefore, to scrutinize carefully all facts pertaining to the rate-making process, lest the people be compelled to pay more than what is just and reasonable.

What is a just and reasonable rate? Under ordinary circumstances, it is a rate calculated to allow a fair rate of return to the utility on its investment. The fact that the Commission adopted a sliding-scale plan of rate determination, in no way diminishes our statutory obligation to weigh and consider all the facts or to prescribe rates which are just and reasonable.[*] That this was well recognized as part of the sliding-scale arrangement itself, is evident from the following language of the Commission when it adopted the sliding-scale plan:

> An administrative body such as the Public Utilities Commission cannot vest or divest itself of jurisdiction.

[*] Even if Paragraph 18 of our statute did not expressly reserve to the Commission the right to alter or amend all orders relative to rates, notwithstanding any arrangement or mutual agreement, and even if the sliding-scale arrangement did constitute an agreement, there would still be a question whether this Commission would have the authority to bargain away its power to fix just and reasonable rates. *Freeport Water Co.* vs. *Freeport*, 180 U. S. 587, 599.

> * * * The Commission early recognized that if any such arrangement was to be of real value it should be sufficiently flexible in its provisions to meet changing conditions in such manner as to avoid injustice to the consumers or the Companies and at the same time to permit timely benefits. To endure it must be susceptible of such modifications both as to substance and form as the facts or conditions from time to time may require.

There can be no conflict between the arrangement and the statute. Section 11 of Finding No. 2 of the arrangement itself provides that any interpretation of the arrangement, or any provision thereof, should be in conformity with the Act, and that nothing contained in the arrangement should operate to the prejudice of any interested party under said Act. It follows, therefore, that in the determination of what should, or should not, enter into rate making, the Act, and not the arrangement itself, must govern.

There is another provision in our Act which must prevail as against any formula adopted in the sliding-scale arrangement, and that is Paragraph 90* of the Act under which this Commission is charged with the duty of enforcing the provisions of the Public Utility Law, "as well as all other laws relating to public utilities." This provision throws light on the question whether the sliding scale arrangement must work equally "both ways," that is, whether there is to be a decrease or an increase in rates.

Having erroneously started with the premise that the sliding-scale arrangement is an "agreement" between the Commission and the Company, the latter made a popular appeal to the effect that the sliding-scale arrangement should work both ways. The newspapers, both in their news and editorial columns, took up this cry and completely beclouded the issue,

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* "PAR. 90. That the commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this section as well as all other laws relating to public utilities."

apparently on the theory that it is poor sportsmanship to have an agreement work one way but not the other.

I agree that a sliding-scale plan can be devised which, if properly applied, should work both ways *and in conformity with the Act*. The present sliding-scale arrangement, however, cannot work *equally* both ways, if the Act, and not the arrangement, is paramount. Under this plan, when the Company during any test year makes excessive profits, there is conclusive evidence of the fact that the existing rates are unreasonably high, and they should be reduced. If, however, the formula under the sliding-scale arrangement shows that the rate during the test year did not reach 6½%, then there is still a question whether the existing rates are unreasonably low or confiscatory, for it is well established law that no public utility is entitled to an increase in rates unless the existing rates are confiscatory.

In this case, the Company has not undertaken to show that the existing rates are unreasonably low. Not only has the Company neglected to show that the existing rates are insufficient, but, on the contrary, the Company asserted and insisted that it was not seeking any increase in rates, as the following demonstrates:

> Chairman HANKIN. You are asking for an increase in rates under the sliding-scale arrangement?
>
> Mr. PRETTYMAN. No. The sliding scale arrangement itself works automatically.

The entire case thus presents an anomalous situation. In ordering an increase, the Commission, in effect, says: The Company does not want an increase; the present rates are not confiscatory; but we want the consumers to pay more than they do now merely because in 1935 our predecessors arrived at a formula according to which the public should now pay more.

THE ADMINISTRATIVE PROCEDURE

When the sliding scale was adopted, $21,000,000 was set as the "initial rate base" as of June 30, 1935. Since then, the rate base has grown because of additions and betterments, until now the rate base is said to be $28,088,332 as of June 30, 1942.

The adoption of the sliding-scale plan, however, did not absolve the Commission from its duty to determine rates upon a correct rate base or to correct any inflationary elements in the rate base already adopted. Recently, upon a reclassification of the Company's accounts in accordance with the Uniform System of Accounts prescribed by the Federal Power Commission and this Commission, it became evident, upon the Company's own showing,[10] that the rate base was inflated to the extent of $1,055,549.52, being the difference between the appraised value of the Company's lands and their actual cost.

I, therefore, raised the question whether the rate base for the test year ending June 30, 1942, should not be diminished by this amount. The Company moved to strike, arguing that the question was not within the "scope" of the present hearing, that at the present time the Commission was concerned only with the rate under the sliding-scale plan, and that the question as to the proper rate base might be taken up in some other proceeding. The Commission granted this motion.

Yet, how can any reasonable rate be determined without a correct rate base? Surely the sliding-scale plan does not contemplate that we multiply the errors of the past. If it does, then the plan is in direct conflict with our statutory duties, and, therefore, invalid. The answer is simple. Neither under the sliding-scale plan nor under any other plan of rate making can it be said that the correctness of the rate base is without the scope of the rate determination. In these circumstances, I am of the opinion that the rate base for the purpose of determining the proper rates under the sliding-scale plan should now be diminished by $1,055,549.52.

The ruling of the Commission sustaining the motion to strike the above question, as also its rulings in the course of the proceeding, sustaining objections to information sought by one of the Commissioners, raises a question by far more important than the amount at issue in this proceeding. It brings into issue the propriety of the proceeding itself. Is it within the

[10] If the experience of other natural gas companies is a criterion, the Federal Power Commission will undoubtedly find additional items for disallowance from the cost claims of the Washington Gas Light Company.

proper function of the Commission to rule out questions asked by one of the Commissioners?

When a question is asked by counsel, and objection is raised by opposing counsel, the objection is, in substance, an appeal to the Commission for a ruling that the information sought is irrelevant to the proceeding. If the Commission finds that the information is irrelevant, it sustains the objection. In practice, such objections are sustained in administrative proceedings only if it is evident that the information sought would not be relevant to any plausible theory upon which the case may be decided.

In a proceeding now pending jointly before the Federal Communications Commission and this Commission,[11] we find an excellent illustration of this rule of admissibility of evidence in administrative proceedings. There I suggested an interpretation of a provision in the Federal Communications Act which, if adopted, would make a large part of the respondents' testimony irrelevant to the determination of the case. The respondents argued for a different interpretation. When the respondents introduced voluminous evidence based on their interpretation of the statute, Counsel for the Federal Communications Commission moved to strike, and, on my own suggestion, the objection was withdrawn.[12]

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[11] In the Matter of Telephone Charges of Hotels, Apartment Houses, and Clubs on Interstate and Foreign Telephone Communications. F. C. C. Docket No. 6255, P. U. C. Formal Case No. 311.

[12] "Mr. COHEN. I move at this time that all the testimony of Mr. Crunden and of Mr. Larkin on Thursday and of Mr. Florance be stricken from the record, and all the exhibits produced in connection with the testimony of those three witnesses, I move that that not be admitted into the record. The testimony of these three witnesses is based on the position that the Respondent telephone companies can control the scope of the jurisdiction of the Federal Communications Commission by the manner in which they fix their charges.

"I think as Commissioner Hankin suggested the other day, it is rather novel doctrine that a regulated utility should be able to control the jurisdiction of the regulatory agency by what the utility contends that its charges cover.

* * * * * *

"Commissioner HANKIN. Well, we can agree with you that that is a reasonable interpretation, but is that the only interpretation, and if there is a possibility left for a different interpretation, isn't it competent for the

If there is among the Commissioners one who deems the information relevant, then such objections are overruled as a matter of course. Where the information is sought by one of the Commissioners, an objection to the question is *out of order*, for to sustain the objection would mean to interfere with the function of the Commissioner to weigh the facts in accordance with the theory of the case which he deems applicable. Referring again to the telephone case now pending before the Federal Communications Commission and this Commission, the respondents indirectly objected to a question asked by one of the Commissioners, and Commissioner Walker, who was the Chairman of this joint proceeding, said: "Well, you are in effect raising a query as to the right of a member of the Commission to ask questions." The objection was not even entertained.

This is the correct procedure in administrative proceedings in general. Under our statute, such procedure is imperative. Paragraph 97 (b)[13] provides that "any investigation, inquiry

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telephone company to introduce evidence based upon that interpretation of the statute?

"Mr. COHEN. Well, I think it isn't competent for the reason that, as I think I stated, it is predicated simply on the basis that the telephone companies are free to fix their charges on any basis they please and thereby control jurisdiction.

"Commissioner HANKIN. So long as they come within the terms of the statute?

"Mr. COHEN. Well, my position is that it is for the Commissions to make the determination as to whether the services they do cover come within the statute.

"Commissioner HANKIN. In other words, you come back to the first point that you would urge an interpretation of the statute which would preclude the telephone company from varying the scope of the Commissions' jurisdiction—that is true?

"Mr. COHEN. By simply saying what their charges cover.

"Commissioner HANKIN. Yes. Well, now, let us assume that we permit the telephone company to urge an interpretation of the statutes different from the one that you would like, don't you think that they should be permitted to introduce evidence which would bring out that interpretation?

"Mr. COHEN. If the Commissioner please, I think that is a decision for the Commissioners to make.

"Commissioner HANKIN. That goes to your motion as to the relevancy of that evidence, doesn't it?

"Mr. COHEN. I think that is correct, yes, sir" (Record, pp. 841–844).

[13] "PAR. 97. (b) A majority of the commissioners shall constitute a quorum to do business, and any vacancy shall not impair the right of the remaining

or hearing within the powers of the commission may be made or held by any commissioner." Under this provision, no question asked by a Commissioner can be ruled out as irrelevant, unless the question falls beyond the scope *of the powers* of the Commission itself. In this case, the Commission undertook to rule that certain questions fell beyond the "scope" of the proceeding. One of these questions related to the correctness of the base upon which the rates were to be computed. Surely it cannot be said that the correctness of the rate base in a rate-making proceeding falls beyond the powers of the Commission itself. And if it cannot be said that the inquiry falls beyond the powers of the Commission, the ruling constitutes a flagrant interference with the statutory powers and duties of the Commissioner who seeks to ascertain the correctness of the rate base.

In support of the Commission's rulings sustaining objections to questions asked by one of the Commissioners, the Company relied on the opinion of the Federal Power Commission in the matter of the *Hartford Electric Light Co.* (Opinion No. 58–A, decided October 21, 1941), in which that Commission had ruled that it was not necessary to make a finding based upon a theory of the case which the Commission had rejected. I am in thorough agreement with that ruling. The ruling of the Federal Power Commission in this regard, however, is a far cry from saying that the only evidence admissible is that which is necessary for the decision of the case upon the theory finally adopted. As a matter of fact, in the *Hartford case* itself some 1,100 pages of testimony was introduced by Counsel for the Hartford Electric Light Company, who is also the General Counsel of the Washington Gas Light Company, and the evidence was admitted on a theory which Counsel for both the Company and the Commission later realized was not necessary for the decision of the case.

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commissioners to exercise all the powers of the commission. Any investigation, inquiry, or hearing within the powers of the commission may be made or held by any commissioner, whose acts and orders, when approved by the commission, shall be deemed to be the order of the commission. The commission shall have power to adopt and publish rules and regulations for the administration of the provisions of this section, including the conduct of its investigations, inquiries, hearings, and other proceedings."

Proper administrative and judicial procedure, alike, require that a case should not be prejudged. If, upon any plausible theory, certain facts are relevant, they should be admitted, especially if one of the Commissioners deems that theory of the case applicable.

If, as it appears in this case, a Commission may rule out questions asked by a minority Commissioner, it follows that he may bring out only those facts which are acceptable to the majority, but no others; he may dissent on abstract questions of law, but not on matters of law which require a factual foundation. The Commission may as well tell him "to go home" and not participate in the hearing at all. In these circumstances it may fairly be said that if the information sought would be of benefit to the Company, the exclusion of the information deprives the Company of a full and fair hearing; if the information sought would be of benefit to the rate payers, then the exclusion of the information deprives the rate payers of a full and fair hearing.

As a matter of fact, as the proceeding has developed, neither the evidence nor the decision was limited to those questions which fell within the "scope" of the proceeding, as defined in the ruling of the Commission, when it excluded questions concerning the rate base.

The Commission excluded excess-profits taxes in the amount of $43,928.02, also $115,863.09 which are said to be abnormal income taxes due to the present war conditions. There is no provision in the sliding-scale arrangement for the elimination of any taxes [14] (a view apparently taken by the Commission in the course of the hearing), unless the words "reasonable accruals of taxes" are interpreted to mean that only such taxes may be deducted from gross revenue as are "reasonable" for

[14] The sliding-scale arrangement provides for the following method of computing the net amount available for return: "Having determined the Rate Base for a particular Adjustment Date, the Commission shall next determine the Net Amount Available for Return for the Test Year by deducting from the Gross Operating Revenue (Section 4) of the Companies the Adjusted Operating Expenses (Section 5) for the Test Year, the accruals for Retirement Reserve (Section 8), reasonable accruals for uncollectible bills, and reasonable accruals for taxes; * * *."

rate making purposes,[15] rather than taxes which may reasonably be expected to accrue.

In connection with the argument that it would be unfair to charge the consumers with the excess-profits taxes imposed on the Company, the present Chairman, himself, suggested a plan for consideration at the hearing, whereby the Company, upon receiving an increase in rates, would refund to its customers such part of the increase as might result in excess-profits taxes.[16] One will search in vain the sliding-scale plan for a proposition of this character.

The Administrator of the Office of Price Administration was permitted to intervene in this case. Among the evidence presented by the intervener were facts relating to the reasonableness of deductions for wartime taxes in computing the net operating income, and facts relating to the amount allowable for depreciation. That was objected to by Counsel for the Company on the ground that the evidence was beyond the "scope" of the proceeding, and the Commission sustained the objection. But when the Company, after reconsideration, withdrew its objection, the evidence was admitted.

It would thus appear that the rulings on admissibility of evidence were not based on any well defined concept of what constitutes the "scope" of the hearing, but depended largely on whether the majority of the Commission and the Company were willing to have the evidence admitted. The rulings made by the Commission, together with the circumstances attending the entire proceedings,[17] leave no doubt that the public had

[15] I think this is the only proper meaning of the phrase "reasonable accruals of taxes."

[16] More will be said about this plan later in this opinion.

[17] (a) In the course of the hearing, Counsel for the Company assumed to dominate the proceeding, even to the extent of attempting to annoy and order about Counsel for the intervener as to the manner in which he should conduct his case. No attempt was made by the present Chairman of the Commission to correct Counsel for the Company. Finally, I was compelled to inform Counsel that the Commission, and not the Company, was conducting the hearing.

(b) In the course of my cross-examination of the Company's witness concerning the plan suggested by the present Chairman, whereby the Company might return part of the increased rates in order to avoid payment of excess-profits taxes, some of the officers of the Company resorted to loud laughter,

not been given a full and fair hearing. It can, in no sense, be described as a judicial proceeding.

At the conclusion of the hearing, Counsel for the Office of Price Administration, as also other interveners (Washington League for Women Shoppers and the Fort Davis Citizens' Association) petitioned that the proceeding be reopened in order to permit a full hearing on all elements entering into the rate determination. The petition was denied. In view of the above, I think that the denial of the petition constituted reversible error.

The decision of the Commission was not based on deliberations by the Commission. I am not aware of a single meeting or conference held to discuss the many questions of fact and law involved in the case, except the applicability of the Act of October 2, 1942, "To amend the Emergency Price Control Act."

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and thus interfered with the cross-examination. Nothing was done by the Chairman of the Commission to correct such conduct on the part of participants in the proceeding.

(c) It was evident throughout the hearing that my questions were resented both by the Commission and the Company. Toward the end of his examination, the Company's principal witness made no attempt to hide his contumacious conduct. As was correctly reported by the Evening Star, September 12, 1942, "during the late afternoon, he (the Company's witness) displayed considerable annoyance over the continued Hankin attack, at times turning his back and shouting answers over his shoulder." Nothing was said or done by the present Chairman to correct such conduct on the part of the witness.

(d) At one time, after I directed some questions to the Commission's Chief Accountant, the following appears in the record (p. 623):

"Chairman FLANAGAN. Mr. McElfresh, did you make that calculation in furtherance of your investigation of these accounts and allocations as an accountant?

"Mr. MCELFRESH. No; I did not, sir.

"Commissioner HANKIN. In what capacity did you make that calculation?

"Mr. MCELFRESH. I made it at your request.

"Commissioner HANKIN. As Chief Accountant of the Public Utilities Commission, or someone I met on the street?

"Mr. MCELFRESH. As Chief Accountant of the Public Utilities Commission."

Thus the implication of the present Chairman's question seems to be that information furnished by the Chief Accountant to support the view of the majority is properly the information of an accountant. But when he furnishes information in opposition to that view, though requested by one of the Commissioners, he is not even acting in the capacity of an accountant.

According to the procedure adopted [18] by the Commission in cases where there is a division of opinion, the majority opinion and order must be submitted to the minority member; if he writes a dissenting opinion, it is submitted to the majority so that they might have an opportunity to amend the majority opinion; the minority member then has an opportunity to amend his opinion; then the majority and minority opinions, together with the order, may be issued. In this case, the majority opinion was submitted to the minority member on October 9th, in draft form. This was superseded by a draft dated October 12th, in which there were many material changes. The order was submitted for the first time, in final mimeographed form, on October 13th. On the same day, the Commission decided to issue the opinion and order without giving the minority Commissioner an opportunity to prepare his dissent. There was thus no opportunity for deliberation or discussion by the Commission prior to the decision of the case.

Operating Expenses

In the days when rate-making was full of speculation, due to the supposed constitutional necessity of arriving at the reproduction cost value of utility property, the regulatory agencies had a sufficiently difficult task when they concentrated their attention on the rate base. The utility commissions generally accepted the companies' figures relating to operating revenue, and very little was done by way of scrutinizing the operating expenses. Recently the Supreme Court held [19] that the Constitution does not bind rate-making bodies to the reproduction cost theory. No longer can regulatory agencies insist that they are compelled to compute rates upon an inflated rate base,

[18] "The following agreement was reached covering procedure in cases of disagreement between Commissioners prior to the issuance of orders or opinions: Draft of the majority opinion and order will be submitted to minority member and will not be issued until minority opinion draft has been served on majority members. Majority opinion and order may then be modified, and if the minority opinion is not modified, both will be issued simultaneously."
(Minutes of the Commission, March 3, 1942, p. 2161.)

[19] *Natural Gas Pipe Line Co.* vs. *Federal Power Commission*, 315 U. S. 62 S. Ct. 736.

and that they are required to do so by decisions of the Supreme Court.

There can also be no doubt that the proper basis for determining a reasonable return upon the property invested is the amount of the actual investment, which is the actual legitimate original cost of the property,[20] not the reproduction cost of something which probably is not reproducible. The determination of the actual cost of property is a task insignificant compared with that involved in determining value on a reproduction cost basis. With this major task in rate making reduced to mere auditing, it behooves regulatory commissions to turn their attention to the other significant elements of rate making, namely, the deductions from gross operating revenue and what constitutes a reasonable rate of return.

A public utility, which is entitled to a reasonable return, computed by *net* operating revenue, is under a constant duty to operate as economically as possible, and it is the corresponding duty of the regulatory agency to allow as deductions from gross operating revenue only such expenses and such other charges as are incurred for the benefit of the public, not for the benefit of anyone else. This rule is often stated in somewhat different language. It is said that a utility is entitled to a recoupment of all its operating expenses, provided they are reasonable. There is also a rule, however, that since the public utility is a private corporation, the regulatory agency should not interfere with the managerial functions of the directorate of the corporation. Adding these two propositions together, it has been argued that all expenses incurred must be allowed, unless it be shown that the directors have acted in disregard of their duties, for the reasonableness of the expenses depends largely upon the judgment of the directors, and to disallow expenses as being unreasonable would constitute an interference with the managerial functions.

The fallacy of the argument lies in adopting the psychological processes of the directors, that is, their *judgment*, as the test of reasonableness. What has been the practice of the

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[20] *In re Chicago District Electric Generating Corporation*, 39 P. U. R. (NS) 283; *Detroit* vs. *Pan-Handle Eastern Pipe Line Co.*, F. P. C. Docket No. 200, decided September 23, 1942.

directors heretofore, and what is the practice of directors of other utilities, are questions which hardly furnish a proper test of reasonableness. They are tests which, of necessity, impinge upon the managerial functions of the directors of the corporation.

In this case the Commission adopted a different and rather novel test of reasonableness, namely, the judgment of the Commission's witness. For example, with reference to an adjustment made by the Company in computing salaries and commissions chargeable to sales promotion expense; the Commission, after describing the method used by the Company, said, "and since this is the method used by the Commission's witness, we think the adjustment is proper".[21]

If the Commission is to avoid interference with managerial functions in this regard, it must apply tests of reasonableness which are objective and which are not a function of the judgment of the directors. In determining whether the amounts claimed as operating expenses are properly deductible from gross revenues, we must inquire: (1) Are any of the expenditures contrary to law or to the commission's rules and regulations; if they are, then they are unreasonable *per se*; and (2) If the expenses do not, on their face, contravene the commission's rules and regulations, they must, nevertheless, be scrutinized as to whether they are incurred for the benefit of the consumers, and if so, to what extent. Superimposed on these two tests is the proposition that the quantum of proof as to reasonableness is not the same as to all types of expenditures. For example, there is a difference between the proof necessary to establish reasonablenss of capital expenditures and that necessary to establish reasonableness of operating expenses. In the former case, the company spends its own money, and it may well be assumed that a utility will not incur unreasonable costs. Therefore, such expenditures need not be deemed unreasonable, unless they are excessive and perhaps raise a presumption of gross neglect, collusion or fraud.[22] In the case

[21] The Commission made no findings of fact which would lead to the conclusion that the expenses allowed are reasonable.

[22] *Re Pennsylvania Power and Light Co.* (F. P. C. Opinion No. 68), decided April 14, 1942.

of expenses incurred by the company as operating expenses, outlays which the company is entitled to recoup before the rate of return is computed, the situation is entirely different. Here the company is actually spending *other people's money*, and it is so easy to be liberal with expenditures when someone else has to foot the bill.

This is illustrated by the facts of this very case. In the 1941 proceeding, it appeared that the Company contributed about $1,200 to the Greater National Capital Committee, and claimed the amount as an "expense". The claim was disallowed. This year the contribution to the Committee was only $85. How easy it would have been for the Company to contribute $1,200 if the consumers of the District of Columbia were made to reimburse the Company! How quickly the directors of the Company decided that only about $100 would constitute a reasonable contribution, when they found that they had to dig into the Company's own coffers!

With these considerations in mind, let us look into the Company's operating expenses.

Expenses Contrary to the Commission's Rules and Regulations

Donations.—Under our Uniform System of Accounts, donations do not constitute operating expenses and must be charged to Account No. 538—Miscellaneous Income Deductions. Pursuant to this requirement, charitable contributions had been excluded from operating expense. Nevertheless, the Company included in its operating expense a number of donations, among them being a contribution of $1,250 to the United Service Organizations and $85 to the Greater National Capital Committee. These two items were disallowed by the Commission. I agree in the disallowance, but prefer to state my own reasons, because they are illustrative of the reasons for disallowance of additional amounts which the Commission has failed to disallow.

The Company argued that the contribution to the United Service Organizations should not be eliminated from operating expense, because this is not a charitable, but a military or a patriotic, contribution; that it is entirely a question of policy

whether the United Service Organizations should obtain small contributions from large numbers of persons or should look to large contributions from a few. In making this argument, the Company overlooks the essential principle behind the ruling that charitable contributions may not be charged to operating expense. They are not excluded from operating expense because they are charitable, but because they are contributions. No matter how laudable the purpose, a contribution or a donation is not an expense incurred for the benefit of the consumer in the service rendered by the Company.

In disallowing this item; we do not interfere with the judgment of the directors of the Company. On the contrary, we may applaud such contributions and encourage even greater contributions. But we have no right to permit the Company to be magnanimous at the expense of the public. We have no right or power to appoint the Company as an agency for the collection of charitable or patriotic donations, and we have no right to require the public to contribute for charitable or patriotic purposes, either directly or through the Washington Gas Light Company.

As to the contribution to the Greater National Capital Committee, the Company stoutly maintains that this is not a donation at all, but an "expense" incurred in order to promote the sale of gas, which is to the benefit of the consumer. The conclusion is rather far removed from the premise. The argument runs as follows: The Greater National Capital Committee sponsors conventions; conventions bring people to Washington; their activity in the District makes them hungry; when they get hungry, they eat in restaurants; the restaurants must cook food, and in doing so, must burn gas; the gas is supplied by the Company; the more gas sold, the less the cost to the consumer. *Ergo*, a contribution to the Greater National Capital Committee is an operating expense incurred for the benefit of the consumer. A better *Rube Goldberg cartoon* could not have been devised! By a parity of reasoning, any contribution for any purpose can be shown to inure to the benefit of the consumer. Such explanations of contributions as operating expenses do not constitute proof, but, on the contrary, cast

doubt on the validity of the Company's explanations for the treatment of other contributions as operating expenses.

In addition, the Company included the following items in operating expenses: Tickets to Police and Fire Outing—$10; tickets to Police and Fire Field Day—$30; tickets for representatives of the Company to a dinner to the retiring Superintendent of Police—$50; total—$90. The Company was quite ready to defend these as items of operating expense, but, upon the suggestion of the present Chairman, the Company conceded these items as being improper. Since the amount at issue is small, I should not have raised these questions, except for the fact, already mentioned, that none of the Commissioners had, prior to the hearing, any opportunity to go into the accounts, and the Commission's staff merely echoed the explanations given by the Company. The important thing about these three items is not the amount involved, but that there is no telling what might have been found in the accounts, had they been carefully analyzed.

The Company also contributed $1,668.30 to the Institute of Gas Technology in Chicago. It explained that this was an operating expense, because the Institute may train persons who may be helpful to the gas industry, that thereby this Company may be benefited, and consequently the consumers in the District of Columbia may be benefited. These problematical benefits for the consumer are much too far removed from actuality to treat the contribution as anything more than a donation to an educational institution.[23] Donations are no less gifts if the purpose is charitable, patriotic, educational or otherwise.

Services on Customers' Premises.—Included in operating expenses is the sum of $440,814.81, representing Services on Customers' Premises—Account No. 769. Of this amount, $389,098.33 has been allocated to services rendered in the District of Columbia. The items constituting this amount do not correspond to any items prescribed in Account No. 769, such as, improving character of service; inspecting, testing or adjusting customers' equipment; inspecting premises; investigating

[23] The Commission made no finding as to this contribution, but apparently allowed it as "reasonable."

and adjusting service complaints; or installing, removing and renewing gas lights. The items constituting this amount bear all the earmarks of merchandising and jobbing,[*] with nothing to show that the Company has given any heed to the instruction in Account No. 769 that expenses incurred in connection with merchandising, jobbing or contract work should not be included in this account.

In order to prove that the costs were not incurred in connection with the Company's appliance business, its witnesses testified that the expenses represented services rendered alike to all customers having these appliances, not merely those who purchased appliances from the Washington Gas Light Company. When asked for a breakdown of these services as between customers who purchased their appliances from the Company and other customers, the Company would not submit such breakdown, claiming that its service accounts are not so classified as to make such a segregation practicable. In the light of this fact, the entire sum of $389,098.33 should be disallowed, for want of proof that the items included constitute services other than those rendered in connection with merchandising and jobbing.

It is not necessary, however, to rest the disallowance on this ground alone. Section 8 of Order No. 2098, dated August 26, 1941, provided that "all piping, fixtures and appliances on the customer's side of the meter should be installed and maintained under the responsibility and at the expense of the customer or owner of the premises". Under this provision, it matters not whether the work was done for the customers who

[*] They are:

Refrigerators	$ 60,424.59
Househeating appliances	167,441.47
Househeating appliances—Utilization Dept	1,727.08
Commercial appliances	33,697.68
Commercial appliances—Utilization Dept	59.14
Commercial appliances—Government Sales Dept	442.92
Other appliances and miscellaneous (ranges and water heaters)	135,518.60
Other appliances and miscellaneous (ranges and water heaters)—Utilization Dept	25.38
Maintaining Installations	41,478.05
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(51,716.48)
	389,098.33

had purchased their appliances from the Company or for other customers. None of the work on the appliances was chargeable to the rate payers, whether the work properly belonged to merchandising and jobbing, or otherwise.

The Company sought to distinguish between servicing and maintaining appliances. If you put an appliance in proper working condition, it is rendering service; if you have to use new parts, you maintain the appliances, the Company's witnesses said. It will be noted that one of the items is "Maintaining installations—$41,478.85". Even this, according to these witnesses, did not fall within the requirement that piping, fixtures and appliances shall be "installed and maintained * * * at the expense of the customer." In presenting these arguments by way of testimony, the Company is, in effect, asking us to distinguish between Tweedledum and Tweedledee. The words used in Section 8 are clear. To install means: "To set or fix in position for use or service: as, to install a heating or lighting system". To maintain means: "To hold or keep in any particular state or condition; esp. in a state of efficiency or validity".[28] In order to keep a refrigerator, a house heating appliance or a range in a state of efficiency, in other words, *in order to maintain it*, it may be necessary to adjust parts or make repairs with or without any parts. The distinctions sought to be established by the Company have no foundation, either in fact or in reason.

The Company further argued that to charge these services to individual customers might result in disaster. People would undertake to adjust their own appliances, and the results would be explosions, fire, conflagration, asphyxiation, etc. The argument is too ridiculous to be entertained. It may as well be argued that the Company should be called upon whenever it is necessary for a housewife to light the oven, for it may happen that she may turn on the gas, fill the room with it, and then strike a match, causing the entire room to explode. Undoubtedly, such accidents might have happened, but we live in an age when daily we use mechanisms which are by far more hazardous than a gas appliance. At any rate, the

[28] Webster's New International Dictionary.

argument has no validity as against the provision of Section 8 of Order No. 2098.

The same may also be said about the Company's argument that it is necessary or desirable to charge these services to the rate payers in general, as part of the Company's effort to promote the use of gas. This may be an argument for the elimination of Section 8, but by no means an argument for charging all the rate payers with what should have been charged to the particular customers. The Company is not at liberty to disregard the Commission's order merely because it thinks it can promote the sale of gas better by what has the appearance of "free service". There was a good reason for the inclusion of Section 8, and that is the requirement that the service rendered by the Company be as inexpensive as possible. If this service is not rendered "free", then there will not be as many calls upon the Company. The particular customer served may have to pay a small part of the $400,000, but the greatest part of this sum will not be reflected in the rates charged to all consumers. If the Company is anxious to promote the use of gas, it may consider doing so by lowering expenses, rather than by raising them.

Nothing was said by the Commission in support of its allowance of these $389,098.33.

Promotional Expenses.—Included in operating expenses are items totaling $243,420.50 [20] under the heading of "Sales Promotion Expense", of which $27,348.23 has been disallowed by the Commission. I think that the remainder, $216,072.27, should also be disallowed. Our Uniform System of Accounts permits promotional expenses, but there are two limitations, first, the promotional expenses must be incurred for obtaining *new* business, and second, the accounts relating to sales promotion expenses (Accounts Nos. 785 to 787) must not include

[20] The items are as follows:

Supervision	$83,577.50
Salaries and commissions	92,901.74
Demonstration	20,840.46
Advertising	49,794.81
Miscellaneous Sales Expense	27,636.37
Distributed to Washington Gas Light Company of Montgomery County, Maryland	(31,330.38)
	243,420.50

costs incurred in connection with merchandise or appliance sales.

The Company's witnesses admitted that in making these expenditures no distinction could be made between old and new business, and that all gas promotional expenses were incurred generally for the purpose of promoting the sale of gas. Yet, there is good reason for the distinction made in the Uniform System of Accounts between expenditures incurred in order to keep old customers and those made to get new customers. The former may not be included in operating expense, although the latter may. To charge to promotional expense the amounts spent for keeping old customers from going into the use of a competitive service, like that of the electric company, really means that the utilities get the consumers "coming and going". As the Illinois Commerce Commission said: [27]

> It is the opinion of this Commission that a house holder in Chicago should not be called on to pay in his rates for gas service the costs which the company may incur to hold his business, and also to pay in his rates for electric service the cost which the electric company may incur in an effort to take that business away from the gas company. The stockholders of the Company may permit the management to incur expenses to retain such business as it may see fit, but they cannot look to the rate payer to reimburse them for such expenses.

There is another reason why promotional expenses to keep old customers are not a proper charge against the consumer. Such promotional expenses are really expenses incurred to keep the customers' good will. If these expenditures are charged to the consumers, then it, in effect, means that the consumers are made to pay for their own good will. It has already been established that utilities are not entitled to increased rates based on the value of customers' good will included in the rate base. The inclusion of such promotional expenses in operating expense is another way of accomplishing the same forbidden result.

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[27] *In re: Peoples Gas Light and Coke Co.*, 19 P. U. R. (N. S.) 177, 265.

In view of the fact that the promotional expenses were incurred for the purpose of promoting the sale of gas generally, and not merely for the purpose of obtaining new business, this item should be disallowed for want of proof showing what part of the expense, if any, was incurred for the purpose of getting new business.

But there is still another reason why this item of sales promotion expense should be disallowed. This, like the one pertaining to service on customers' premises, does not conform to the instructions in the Uniform System of Accounts that expenses incurred in connection with merchandise or appliance sales should not be included. The Company did make a general allocation of some of the items, between merchandise and jobbing, on the one hand, and sales promotion expense on the other. The division was 20 per cent for the former, and 80 per cent for the latter. The Company made that division on the basis of their best considered judgment, but they could produce no facts upon which that judgment was based. In fact, the attitude of the Company is—this is our opinion, and that is all there is to it.

Under the Uniform System of Accounts, merchandising, jobbing and contract work must be included in Account No. 789 of the operating expense accounts, if the State's statutes or orders of the Commission having jurisdiction over the utility permit income to be reported as an operating expense item. Otherwise, such expenses must be reported in Account No. 520, as non-operating expenses. This matter had an interesting history in the regulation of the Gas Company by this Commission.

Prior to 1931, the Company, in accordance with the system of accounts then in effect, treated its appliance business as part of its utility business and charged both the income and expense to operating revenues and expenses. The appliance business was operated at a loss, and the loss was charged to the consumers, on the theory that these losses constituted legitimate promotional expenses. On March 12, 1931, the Commission issued Order No. 900, in which it held that the cost of handling, displaying and marketing appliances should not be borne by the consumers as a whole, nor taken into consideration in ar-

riving at any rate to be charged for gas service. After providing how the revenues shall be treated in the new account set up, and after directing that the cost should be charged to this account, the order specifically provided:

> This account shall also be charged, with the compensation of *all* employees engaged in the purchase, *sale*, delivery, installation, displaying, demonstrating and marketing of merchandise or of jobbing or contract work, *to the extent* that such employees are so engaged, together with *supervisory* expenses incident thereto, *all advertising* of such merchandise or work and expenses incident thereto, rental of display rooms, showrooms and warehouses, either in rented quarters or in property owned, to the extent that such quarters are used for the merchandise and jobbing departments, the cost of house services associated with the use of space for such purposes, the compensation of employees, engaged in billing, collecting and keeping the records associated with the merchandise and jobbing department, to the extent that they are so engaged, the costs of adjustments of merchandise incident to its installation and conditioning for use, the cost of making good any guaranty of merchandise or jobbing work, the cost of removing and reconditioning repossessed merchandise, and *all other expenses incident to or connected with the merchandise and jobbing department* not provided for in the foregoing. [Italics supplied.]

By Order No. 1846, dated January 11, 1940, adopting the Uniform System of Accounts prescribed by the Federal Power Commission, the Public Utilities Commission rescinded Order No. 900, and adopted the text of Income Account No. 520, and further provided that the list of items set out under Account 789 shall be applicable in governing the charges and credits to be made in Account No. 520. The items in Account No. 789 are substantially the same as those included in the above-quoted language of Order No. 900, and, in rescinding this order, there was no intention to vary the substance of what should be included as expenses in Account No. 520.

It will be noted that Order No. 900 provides that *all advertising* of merchandise shall be excluded from operating expense. Account No. 789 includes, as its first item, *advertising in connection* with the sale of merchandise. A mere glance at the book of advertising submitted by the Gas Company showed advertisements of merchandise, or in connection with the sale of merchandise, and the Company's witnesses testified that only a part of such advertising was allocated to merchandise and jobbing. It is evident that the Company followed neither Order No. 900 nor the Uniform System of Accounts in the treatment of advertising. The Company argues that the Uniform System of Accounts does not preclude allocations of expense as between various items of account. That undoubtedly is so. But while some items may be allocated, others may not. Assuming that all items are subject to allocation, there must, nevertheless, appear some basis for allocation rather than the mere opinion or judgment of the Company.

It is not necessary to burden this opinion with illustrations of the fact that the other items included in Sales Promotion Expense are subject to the same deficiencies. For example, there is nothing to show that the item of supervision—$83,577.50—actually related to the cost of supervising and directing the Sales Department and the solicitation of new business; there is nothing to show that the salaries and commissions ($92,901.74) were paid for canvassing and soliciting new business; there is nothing to show that demonstrations ($20,840.46) has nothing to do with the cost of employees engaged in selling merchandise and appliances; and there is nothing to show that the miscellaneous sales expense ($27,636.37) included only the cost of labor and materials used and expenses incurred in soliciting new business. There is nothing to show that any of these items excluded the 17 items set forth in Account 789.

The Commission made no findings in respect of all these questions. It did recognize that the Company had not made a sufficient showing. With reference to the items for advertizing it said: "The fact that the Company segregates appliance advertising from its other or institutional advertising might

of itself be sufficient grounds for saying that all of such advertising relates entirely to the Merchandising Activities of the Company". Why did not the Commission so hold? What are the counterbalancing reasons? One finds only this: "However, in view of the practice of participating in advertising campaigns of other dealers we will go no further than the adjustment made by the Commission's witness". And now one may continue to wonder what connection there is between the Company's practice and the requirements of our system of accounts, and whether the Commission has surrendered its function of judicial determination to its witness.

In view of the above, I think that the entire amount of sales promotion expense should be disallowed.

Expenses Not for the Benefit of Consumers

The above items claimed as operating expense should be disallowed because they do not comply with the Commission's accounting orders, rules or regulations. The reverse does not follow. The mere fact that items of expense do fall within the operating expense classification of the System of Accounts does not mean that they should be allowed. The question still remains whether the claimed items of expense are incurred in the service of the public, and to what extent. To hold otherwise would mean to reduce the rate making function to mere bookkeeping and to surrender this judicial function to the accountants.[28] No system of accounts has been devised, nor will a system of accounts probably ever be devised, which will distinguish between expenditures incurred for the benefit of the consumers and those incurred for the benefit of the corporation's stockholders. For this reason, we must weigh the items of expense to the end that the consumers should not be required to pay for something which does not represent a service to them, but a service to others.

[28] This is a complete answer to the reasoning of the majority that all the operating expenses, except those disallowed have been recorded in accordance with the Uniform System of Accounts and that they are "fair and reasonable and properly considered in the determination of rates under the sliding-scale arrangement".

Association Dues.—This is illustrated by the inclusion of association dues in Account No. 801—Miscellaneous General Expenses. Does the inclusion of association dues mean that the rate payers may be charged whatever dues the Company chooses to pay, whether that constitutes a service to them or otherwise? I think not. For example, it would be unthinkable to allow as operating expense dues or other contributions made to political organizations. It follows that only such association dues may be charged to the consumers as are of benefit to them in the service rendered by the Company.

The Company is a member of the American Gas Association and pays annual dues of about $6,000. It may be assumed, for the purposes of this proceeding, that this is a proper item in operating expense. But the Company has also charged to operating expense dues to the American Management Association ($100), dues to the United States Chamber of Commerce ($150), dues to the Merchants and Manufacturers Association ($150), and dues to the Better Business Bureau ($225). How do these payments result in improved gas service to the public? The record does not show to what extent this Company is actually benefiting from membership in these organizations. This, however, is a minor phase of the problem. The more immediate and important question is: To what extent is the *rate payer* benefiting from the fact that the Washington Gas Light Company is contributing to the support of these organizations? When such expenditures are incurred, and they are brought into issue, the burden is on the Company to show the extent, if any, the rate payer is benefiting from these expenses. The record has not developed these elements of fact. No showing was made by the Company, apart from its general claim that the Company gets "industrial information" from these organizations. If this is the entire justification for the treatment of dues as expenses, it is my opinion that they should be disallowed.

It is not for us to bear the burden of proof and to seek out information why dues or other contributions to various organizations should be disallowed from operating expense. However, in the brief time at my disposal, I did have occasion to look into two items of dues paid out by this Company—dues

to the National Association of Manufacturers ($100) and a contribution to the National Industrial Information Committee ($250). Here also, the Company's evidence in support of these expenses consisted merely of a statement that "they disseminate information of value to the industry generally". This is hardly a reason for making a contribution and charging it to the rate payer, even if the organizations did actually furnish *information*. However, the National Association of Manufacturers and its Committee on Industrial Information had figured very prominently in the investigation made by the Senate Committee on Education and Labor, pursuant to S. R. 266 of the 74th Congress, concerning violations of the right of free speech and assembly and interference with the right of labor to organize and bargain collectively. In his report concerning the National Association of Manufacturers (Report No. 6, Part 6, 76th Congress, 1st Session), Senator LaFollette said (page 154):

> The National Association of Manufacturers had opposed the principal legislative measures sponsored by the national administration during the Congressional session of 1935. It had opposed the National Labor Relations Act, the Social Security Act, the Banking Act, the Utility Holding Company Act, and the President's tax program. In spite of the Association's opposition, all these measures became law. This was a great blow to the Association; but its officers remained undaunted and they redoubled their propaganda efforts. The program of 'education' that was initiated in 1933 and 1934 now became its principal weapon of defense for the status quo and it was carried forward with mounting intensity * * *.

In Chapter 5 of Part 6 of his Report, Senator LaFollette analyzes the nature and techniques of the Association's propaganda material. There is no doubt in my mind that the Association was not one engaged in disseminating industrial *information* for the purpose of improving the gas service to the public, but was and is a *propaganda organization* for the purpose of disseminating a point of view on industrial relations.

There should be no objection on the part of this Commission to contributions by the Company, even for such purposes. In other words, we need not interfere with their managerial judgment. But the Company should not be made a vehicle whereby the rate payer would be compelled to pay for the upkeep of such propaganda.

In view of the above, the dues and contributions to various organizations should be disallowed in the sum of $975.00.[29]

Salaries.—One must not forget that a public utility is engaged in a service to the public. While it has often been said that the persons engaged in such public calling cannot serve two masters at the same time, the fact remains that the officers and executives of the corporation do serve both the public and their stockholders, and very often the interests they serve are in conflict. When the executives and other officers find themselves in this dual service, it is reasonable that, insofar as the service is rendered to the public, the rate payers should pay for it; insofar as it is rendered to the stockholders, the latter should pay for it. Of course, it is not possible to apportion with any degree of accuracy how much should be paid by the rate payers and how much by the stockholders. Nevertheless, there are bases of comparison which give a proximate idea of the amount which the public usually pays for services requiring similar amounts of ability and effort.

The testimony introduced by the Company was limited to the fact that the salary of the President during the year was $31,666.50;[30] the salary of the Vice President and General Manager was $18,000; that of the Vice President and Treasurer $15,000; that of the Assistant Vice President $8,800, and that of the General Counsel $18,000; and that these salaries were set by the Board of Directors. The contention is that the Commission may not disallow any part of these expenses, unless the Board of Directors had acted in an arbitrary or unreasonable manner; otherwise, we should be interfering with the managerial functions of the corporation.

[29] The Commission made no findings as to these disputed items, but allowed them as "reasonable".

[30] On the basis of $32,500 per year.

As has been stated, it is not necessary to interfere with the managerial functions of the corporation in order to ascertain the reasonable amounts which the public should pay for the services of the officers and executives of the corporation. It may be assumed that the directors acted in full compliance with their duties as directors in voting such salaries to these officers. It may even be assumed that the value of their services is many times what is actually paid to them. The pertinent questions are: Whom are these men serving? To what extent should the consumers of gas be required to pay for such services? Assuming that these officers and executives devote full time in behalf of the consumers, what are the comparable salaries which the public pays for similar services? Is it conceivable that the services rendered by the President of the Company are worth to the public more than one and one-half times as much as those of a Justice of the Supreme Court of the United States; or more than twice that of a Cabinet Officer; or more than three times that of a Member of Congress; or more than three and one-half times that of a Commissioner of the District of Columbia? Is there any comparison in the amount of knowledge, ability, work and effort required, between the position of the President of the Washington Gas Light Company, and these other positions of public service? Why should the public be required to pay $32,500 for the services of the President of the Company merely because the payment is made through a public utility corporation rather than through a governmental agency?

These questions have never been answered in the record. I think that the answer lies in the proposition that, when the public pays for a public service, it should not be required to pay more than for comparable public services. If the directors of the corporation, within their judgment and discretion, think that they should pay much higher salaries, they may do so in the interest of the stockholders, but we should not permit such salaries to be charged to the public.

What are the comparable public services in this jurisdiction? The position of public service in the District of Columbia most comparable to that of the President of the Washington Gas Light Company is that of the head of the Water Department

of the District of Columbia. He receives a salary of $5,600 per year. True, his work is generally supervised by the Engineer Commissioner of the District of Columbia, but the latter receives a salary of only $9,000 per year. If we allow, as the public's part of the salary of the President of the Washington Gas Light Company, as much as $10,000 per year, no injustice can possibly result. Similarly, the public's share of the salary of the Vice Presidents might be put at $8,000 per year, and that of the Assistant Vice President at $6,000 per year. The work of the General Counsel of the Company may be compared to that of the Corporation Counsel of the District of Columbia, except that it is very much more limited in scope. True, the General Counsel of the Washington Gas Light Company must pay his own overheads, but it is also true that the Washington Gas Light Company is only one of his clients. If we were to allow $9,000 as the public's share of his annual salary, that would be more than sufficient.

None of the above questions were even considered by the majority. I think that the salaries of general officers and executives for rate making purposes should be reduced by $50,966.50.

TAXES

The sliding-scale arrangement provides that in computing the net amount available for return, allowance should be made for "reasonable accruals for taxes". The word reasonable, as has already been indicated, refers to the taxes to be allowed for rate making purposes. Any taxes which do not contribute to the service rendered to the public are not in any sense reasonable allowances for rate-making purposes.

Capital Stock Taxes.—So far as the public is concerned, it is interested in receiving gas service. It is not concerned with the question whether that service is rendered by an individual, a partnership or a corporation. Utilities are not ordinarily operated by individuals, because the amount of investment is generally too large to be borne by a single person. Where a group of persons undertake to do such business, there are various forms of business enterprise available to them, and the form usually adopted is the corporate form. There are dis-

tinct advantages which attend the doing of business in corporate form, and, if persons engaged in a utility enterprise desire to profit by these advantages, they, not the rate payers, should pay those expenses which are incident to the conduct of business in corporate form.

The stockholders should bear the burden of capital stock taxes (totaling $48,155.11), because these are taxes imposed on the privilege of doing business in corporate form. They are unlike other excise taxes or property taxes which are incident to the business of the utility. Such taxes are allowable as deductions from operating revenue, because they are paid in order to preserve the business of the utility. Capital stock taxes, however, being imposed on the doing of business in corporate form inure to the benefit of the stockholders, not the consumers, and the stockholders should therefore bear the cost of such taxes.[31] Since the capital stock taxes are a charge on the privilege of doing business in corporate form, they cannot be said to be "reasonable accruals of taxes" chargeable to the rate payers.

Income Taxes.—This brings us to the main question presented by the interveners, namely, the amount which should be allowed as a deduction from gross revenue for income taxes. It is my view that income taxes should not be allowed at all as deductions from gross revenue. These are direct taxes imposed on the corporation's net income, after deduction of all expenses. They are not taxes imposed in connection with the gas service, but after the service is rendered and the charges are paid. The entire theory of the income tax is that it must operate as a direct tax on the income and should not be passed on to others. To allow such taxes as a deduction from gross revenue actually means that the regulatory commission exempts the utility corporation from the payment of an income tax and shifts the burden of that tax to the consumers. In the absence of a statutory provision to that effect, which would virtually exempt utility corporations from the payment of income taxes, I do not think that the Commission has the power or authority to grant such an exemption.

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[31] *In re Long Island Light Company* (N. Y. P. S. C.), 18 P. U. R. (N. S.) 65, 207.

I realize that this is a minority view, and that the Supreme Court itself has held that income taxes are properly deductible from gross revenue. I therefore do not urge at this time that all of the Company's income taxes should be disallowed as a deduction from operating revenue. I think, however, that this question should be brought to the Supreme Court for early reconsideration.

The allowance of income taxes as a deduction from gross revenue does not mean that all income taxes must be allowed. Among the items of income taxes paid by the Washington Gas Light Company during the past test year, is an excess profits tax of $63,663.79. The Commission's staff suspended this amount, but credited the income taxes with 31% thereof, because, had the excess profits tax not been paid, the normal tax and surtax would have been increased by $19,735.77. The Commission has sustained this suspension, and rightly so, because, as a public utility, the Washington Gas Light Company is not entitled to any excess profits. To make the consumers pay a rate which would permit excessive profits, and then to require them to pay the excess profits tax, would be heaping injury upon an injury.

Assuming that income taxes, other than excess profits taxes, may properly be deducted from gross revenue, the question still remains whether it would be reasonable to allow a deduction for the entire amount of income taxes paid during the test year. We are passing through a state of emergency in which our Nation, together with the other United Nations, is fighting for the existence of our civilization, not merely for the existence of our own institutions. We are engaged in a war which, more than any other war in the past, involves not only the military forces, but also all of our economic forces, and even relationships which are neither military nor economic. It has become established that not only our military machine, but also our entire economic life, must be geared to the exigencies of this war.

First in preparing for this gigantic struggle and then in the prosecution of the war itself, Congress imposed heavier taxes than were ordinarily necessary to keep the wheels of Government going. Various types of taxes were imposed; among

them, significantly, increased income taxes, on the theory that each and every person must shoulder the burden and responsibility of the war.

For the years 1936 through 1939, the income taxes paid by the Company amounted to 19% of its net income. In the next year the tax burden rose to 31%, and in 1942 to 40%. Should these added taxes be passed on to the consumers? Should the consumers, who bear their own tax burden, also bear the burden imposed by Congress on the Company to aid in the prosecution of the war? I think these additional taxes should under no circumstances be passed on to the consumers. We should not create a class of corporations exempt from the duty of contributing to the Nation's fight for its existence.

Recently, the Federal Power Commission arrived at the same conclusion.[32] Commissioner Scott, speaking for the Commission, said:

> We take judicial notice of the fact that our country is waging a war for survival. It is common knowledge that there will be increased tax burdens resulting from the requirements inherent in a global conflict. Business as usual is out—in fact, a great many so-called "small enterprises" have ceased to exist. Normal business during this period of grave emergency is at an end. Obviously, no one can expect to maintain a status or condition of business unaffected by the holocaust now sweeping the world. Increased tax burdens must be borne by the utility which enjoys a monopolistic position in the economic field, as well as by others who have no such advantage.
>
> * * * * *
>
> So that there may be no confusion concerning the tax situation in connection with the companies subject to our jurisdiction, where necessary to stabilize utility rates at reasonable levels during the war emergency period, we propose to allow as proper operating expenses only such taxes as may be termed ordinary or normal

[32] *City of Detroit et al. vs. Panhandle Eastern Pipe Line Company et al.*, Opinion No. 80, decided September 23, 1942.

> For the purpose of distinguishing between ordinary or normal and war emergency or abnormal taxes, we conclude that the basis prescribed in the 1940 Revenue Act establishes the highest possible level of Federal taxes which may be allowed as an element of operating expense for such purpose. The 1941 Revenue Act and the pending 1942 proposal certainly reflect abnormal tax requirements for war purposes.

The Commission disallowed only $115,863.09 of the war taxes, on the theory that 31% is "reasonable". This the Commission did, as it stated, "after weighing all factors to the best of our ability". What factors did the Commission weigh? Upon what facts? Upon what findings? Surely there was no call for such exertion on the Commission's part when the evidence in the record clearly showed that for the years 1936 through 1939, years of normal taxes, the rate was 19% and that the taxes for the test year ended June 30, 1942, were over $300,000 in excess of what might be termed ordinary or normal taxes. I think that, in addition to the amount disallowed in the form of excess profits taxes ($43,928.02), and the amount of income taxes disallowed by the Commission, income taxes should be disallowed in the sum of $143,706.30. To this should be added the sum of $439.05 paid by the Company to Stone and Webster for expenses in connection with work on excess profits taxes.

There is an additional and transcending reason for the disallowance of the extraordinary and abnormal war taxes. They result in an increase in rates which contributes to the inflationary tendencies in our present economy and thwarts our war effort. Both Congress and the President embarked upon a policy to curb inflationary tendencies. On July 30, 1941, the President addressed a message to Congress requesting the enactment of legislation for the control of prices. Therein he stated:

> Inflationary price rises and increases in the cost of living are today threatening to undermine our defense effort.

Congress responded by enacting the Price Control Act, in which it gave wide powers to the Office of Price Administration. True, Congress specifically omitted jurisdiction over public utilities, but only because it was felt that the regulatory agencies having jurisdiction over the utilities would redouble their efforts to control prices charged by them and would accomplish the same result of curbing inflation.

On August 27, 1942, the President laid before Congress a seven-point national economic policy designed to stabilize the domestic economy of the United States for the duration of the war. The objective was to prevent any further rise in the cost of living. In his famous Labor Day Message to Congress, the President reiterated his stand that inflationary tendencies must be curbed as a war measure. He said:

> War calls for sacrifice. War makes sacrifice a privilege. That sacrifice will have to be expressed in terms of a lack of many of the things to which we all have become accustomed. Workers, farmers, white collar people, and businessmen must expect that. No one can expect that, during the war, he will always be able to buy what he can buy today.

With reference to the function of taxation in economic stabilization, the President further said:

> One of the most powerful weapons in our fight to stabilize living costs is taxation. It is a powerful weapon because it reduces the competition for consumer's goods—especially scarce foods.
>
> The cooperation and self-restraint of the whole Nation will be required to stabilize the cost of living. The stabilization of the cost of living cannot be maintained without heavy taxes on everyone except persons with very low incomes. With such increases in the tax load, unfair tax distribution becomes less and less tolerable. We can rightfully expect the fullest cooperation and self-restraint only if the tax burden is being fairly levied in accordance with ability to pay.

> This means that we must eliminate the tax exemption on interest on State and local securities, and other special privileges or loopholes in our tax law.
>
> It means that in the higher income brackets, the tax rate should be such as to give the practical equivalent of a top limit on an individual's net income after taxes, approximating $25,000. It means that we must recapture through taxation all wartime profits that are not necessary to maintain efficient all-out war production. Such provisions will give assurance that the sacrifices required by war are being equitably shared.

Here the Commission, by exempting the Company from a a part of the war taxes grants an increase in rates, not because there is any showing that the existing rates are unreasonably low or confiscatory, but because apparently a formula adopted in 1935 is deemed more important than our national policy. The granting of the present increase flies in the face of the policy established by Congress and the President. It is a challenge to the Congress and the President, and, within the shadow of the Capitol and the White House, sets an example for other commissions to follow.

The Commission did include a provision in its order whereby any portion of the amount derived from the increased rates, which, if retained by the Company, would be subject to excess profits tax shall be refunded to the customers. This arrangement is said to be designed to guard against the possibility that the increase might result in inflation.[33] If the arrangement has any meaning, it is hardly a plan which is apt to have the effect of preventing inflation. I am rather inclined to the view that the plan adopted will tend in the opposite direction. The plan simply means that the Company will charge increased rates and that, if the Company has to pay excess-profits taxes,

[33] The opinion states that the Commission requested the Company to propose such a protective arrangement. The record shows that the arrangement was not proposed by the Company but by the present Chairman of the Commission. In fact, on cross-examination, the Company's witness testified that he was not prepared to explain the consequences of this arrangement, because, though introduced by the Company, it was an arrangement suggested by the Chairman himself.

then rather than pay such taxes the Company will refund the amounts to the consumers. Yet, if the inflationary effect of increased prices is diminished through taxation, as was stated by the President in his message to Congress, then it may fairly be said that the plan or arrangement will have the effect of furthering inflation rather than preventing it.

The majority opinion seeks to minimize the inflationary effect of the increase allowed. The opinion makes an advertising appeal. The domestic customer will have to pay only 3¢ per month additional, the space-heating customer only 57¢ per month additional; the average increase will be only 46¢ per month additional. How often have we read in the advertising columns: "Buy this set of books for only $100; it costs you only 1¢ per day"! The fact of the matter is that these few cents per month mean over $200,000 taken from consumers, and given to the Company. Tall oaks from acorns grow. These tiny increases are the ones which cumulate into a destructive force.

Depreciation

I have thus grouped the items which should be disallowed as deductions from gross revenue within the terms of the sliding-scale arrangement itself. Unlike these, but like the question I raised as to the rate base, the deduction for depreciation or retirement expense should be adjusted in the light of actual facts and in the light of the recent decision of the Supreme Court in *Natural Pipe Line Co.* vs. *Federal Power Commission*, 315 U. S. —. The provisions in the sliding-scale arrangement as to retirement expense are rather complicated. Reduced to the simplest terms, it means that the retirement reserve shall consist of 1¾% of the initial rate base plus 1¾% of any additions to the rate base from year to year, and that 4% of the cumulated retirement reserve shall be deducted as retirement expense.

There are two errors in this method of arriving at the retirement expense. First, it is computed on the basis of both depreciable and non-depreciable property. Whatever may be the proper rate of depreciation, it cannot be computed on that

part of the rate base which does not depreciate. Therefore, in computing depreciation reserve, the percentage provided must be applied to the rate base diminished by the amount of non-depreciable property. The second error lies in the fact that, while the Company is permitted a rate of return of 6½% on its undepreciated rate base, the amount deducted as depreciation expense is only 4% of the depreciation reserve. This actually means that, in addition to the Company being allowed a return of 6½% on the depreciated rate base, it is allowed an additional 2½% on property which is no longer in existence.

Such computations of retirement expense or depreciation had been pursued in the past on the theory that that also was required by the decisions of the Supreme Court. In the case of *Natural Pipe Line Co.* vs. *Federal Power Commission*, supra, the Supreme Court expressly held that in the computation of a fair return on property used and useful in the service, there is no room for the argument that the Company must be allowed a premium on the depreciation reserve in addition to a fair return on the investment.

Applying the percentage of retirement to the depreciable property only, and applying the same percentage to the cumulated depreciation reserve as is applied to the rate of return, the amount of retirement expense, the record shows, is $120,732. In other words, the deductions from gross revenue should be further reduced by $227,338.01.

Conclusion [34]

In view of the foregoing, the Company, during the past test year, earned at least $874,372.78 in excess of 6½%, and *under the sliding scale arrangement, $617,874.36* should be applied to rate reductions. This computation, limited to the sliding scale arrangement, imputes no recognition on my part that the Company is entitled to retain any amount over and above 6%. In other words, with the record in its present state,

[34] The computations of the figures in this conclusion were furnished by the Chief Accountant of the Commission, in accordance with this opinion.

no injustice would be done, if the rates were reduced by $1,009,207.04.

GREGORY HANKIN.

Draft opinion filed October 13, 1942.
Revised opinion filed October 14, 1942.

Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

Commissioner HANKIN, dissenting:[35]

I cannot agree with Order No. 2404, purporting to grant the petition filed by the Price Administrator in behalf of the Director of Economic Stabilization, because the order does not constitute sufficient compliance with the petition, nor with the Act of October 2, 1942, "To amend the Emergency Price Control Act". I believe (1) that Order No. 2401, authorizing an increase in rates, should be vacated, and (2) that the case should be reopened for the purpose of arriving at a correct rate structure without limiting the Director of Economic Stabilization to the development of evidence relating solely to the inflationary effect of the ordered increase.

1. The Price Administrator, in behalf of the Director of Economic Stabilization, petitioned that Order No. 2401, issued on October 13, 1942, be vacated. In his petition, the Price Administrator stated that the issuance of this order, without

[35] This is a belated dissent to Order No. 2404, issued on October 23, 1942. As I pointed out in my previous dissent in this case, the rule adopted by the Commission requires that the draft of the majority opinion and order be submitted to the minority member, affording him an opportunity to write his dissent; then the minority opinion draft must be served on the majority that they might have an opportunity to modify their opinion or order; then if the minority opinion is not modified, both opinions and the order are issued simultaneously. In this case, the majority opinion and order were not shown to me until about ten minutes before they were issued. There was, therefore, no opportunity to write a timely dissent to be issued together with the majority opinion, and the majority of the Commission had no opportunity to consider the views expressed herein. This may be unbelievable, but it is true.

notice to the Director of Economic Stabilization and without giving him an opportunity to intervene in this proceeding, was invalid and constituted a denial to the Director of his right to appear in this proceeding.

In a letter accompanying this petition, the Price Administrator stated: "It is my judgment that the action of the Commission in issuing an order without prior notice by the Company to the Director of Economic Stabilization * * * is violative both of the letter and the spirit of the Act of October 2". He concluded with the request that the Commission "re-open the proceedings and rescind the order in this case". The Director of Economic Stabilization joined in this request. For the reasons stated in my dissent from Order No. 2401, I think that the order was invalid, and should therefore be vacated.

In its present opinion (accompanying Order No. 2404), the Commission recites that Counsel who filed the present petition is the same Counsel for the Office of Price Administration who had participated in the hearings which culminated in the Order No. 2401, implying that there was anticipatory compliance with the statute. This implication is entirely erroneous. Counsel appeared then for the Office of Price Administration whose intervention was a privilege granted by the Commission. Now he and the Price Administrator are appearing in an entirely different capacity, namely for the Director of Economic Stabilization under an Act of Congress. Even if the President, by Executive Order No. 7250 issued October 3, 1942, had designated the Price Administrator and his counsel as the agency to receive notice as provided in the Act of October 2nd, there would not have been sufficient compliance with the statute.

The Commission also recites the fact that the record was closed prior to the approval of the Act of October 2nd. This did not justify a decision contrary to the law. Even if the case had been decided prior to the passage of the Act, it would have been the duty of the Commission to vacate its order and comply with the requirements of the new law. When a case has gone through the administrative proceedings and through

the courts, including the Supreme Court of the United States, and, within the same term of Court, a statute is enacted which renders the decision of the Supreme Court inconsistent with the statute, the proper procedure is to vacate the order, and to decide the case in accordance with the new legislative mandate. Orders looking *in future*, whether rendered by administrative agencies or courts, must be consistent with the law as of the time when the orders are in operation. Therefore, the conclusion reached by the majority, that it had followed in substance the provisions of the Act of October 2nd, because the record was closed prior to the approval of the Act, is entirely erroneous. On the contrary, in view of the facts attending this legislation, the record should not have been closed; and if it was closed, it should have been immediately reopened when Congress passed the Act. The law does not contemplate that the validity of rates depend on whether the Commission or Congress acts with greater haste.

But let us assume that I am wrong in all I have written in my dissent from Order No. 2401 and in all I am saying here. Let us suppose that the Director of Economic Stabilization and the Price Administrator are wrong in maintaining that the order is invalid. Nevertheless, the respect and courtesy due to these high officers of the Federal Government should have impelled some recognition to their petition that the order be vacated. The Commission might have, at least, set this question for argument. Instead, this request was neither granted nor denied, but *ignored*, as if unworthy of consideration.

2. The majority opinion enumerates a list of detailed steps in the intervention of Counsel for the Office of Price Administration, giving the impression that he had full opportunity to be heard. The record, however, is replete with evidence that the treatment accorded to him in effect nullified his intervention. In my dissenting opinion I reviewed the entire administrative procedure followed in this case and demonstrated that the public had been denied a full hearing.

The majority, in reopening the case for the purpose of receiving "additional evidence relating to the inflationary effect, if any, of the increase in rates" is now attempting to treat the Director of Economic Stabilization in the same manner

as it treated Counsel for the Price Administrator. The Director may intervene, he may introduce evidence, but only to show that an inflationary effect is attributable to the particular $200,000 granted as an increase in rates; to the 3 cents per month which, the majority said, constituted the increase to the average domestic consumer; to the 1/37 of 1 per cent increase in the cost of living index; as to all of which the majority has already concluded: "We cannot conceive that such an increase would have material inflationary tendencies". Yet, if one is to balance economic factors in order to determine inflationary effects, is it not pertinent to consider whether the rates are not already inflated? If a rate is unreasonably low, an increase may be justified. It may not be inflationary, because it would merely bring this cost into proper balance with other costs. But if a rate is unreasonably high, it already contributes to the inflationary effect, which should be removed. Does it not, therefore, become the function of the Director to see whether the rates should be lowered, rather than raised? Under the Act of October 2nd, the Director of Economic Stabilization is given a right to intervene, a right without limitation. For the Commission to say to him that he may intervene, but may not go into all elements of fact and law which he may deem necessary for the determination of the reasonableness of the rate, is to deny him his statutory right as effectively as if the petition were denied outright.

This is disputed by the majority. They say in effect that the Act of October 2nd directs the *public utilities* to give notice to and to consent to intervention by the Director of Economic Stabilization; the Act contains no directives addressed to the regulatory agency themselves; therefore, there is no violation of the Act if the Commission grants an increase, or denies the Director's petition to intervene; and if it may deny him the right to intervene, it may certainly limit the scope of his intervention.

The fact that the statute does not direct the Commission to do or to refrain from doing anything, does not mean that the Commission may so act as to nullify the legislative objectives. The Internal Revenue laws direct the utilities to pay income taxes; these laws do not direct the Commission to do anything.

Yet, is it conceivable that the Commission may require the utilities not to pay the taxes? Wherein would such an order be different from Order No. 2401, in which the Commission *required* the Company to charge higher rates, after Congress directed the Company not to increase its rates unless it first gave notice and consented to intervention as prescribed by the statute? I can see no difference. Could the Commission then say: Let the Company give notice, let it consent to intervention by the Director of Economic Stabilization, we shall render the Act impotent by denying any petition to intervene or by so limiting the intervention as to render it useless? To ask the question is to answer it.

Emergency legislation cannot be drafted with the niceties required of criminal statutes. The mere fact that this statute contains no directives addressed to the Commission, in no way absolves it from its duty to follow the law, especially since our own organic act provides that it shall be the duty of this Commission to enforce not only the provisions of our Public Utility Law, but also "all other laws relating to public utilities".

The majority arrived at the conclusion that the Company was entitled to a rate increase in the sum of $200,000. I arrived at the conclusion that, upon the record made, the Company's rates should be decreased by $617,000. Most of my disallowances were based on the fact that the Company had failed to sustain its burden of proof. It may well be that if the Company were given an opportunity to prove by competent evidence that some or all of those items should be allowed, it would do so. In these circumstances, there is but one way, it seems to me, in which the Director of Economic Stabilization can effectively carry out the intent of Congress and the President, and that is by full participation in the development in the record of all elements of fact which enter into the determination of just and reasonable rates chargeable by the Washington Gas Light Company; by insisting on strict proof relating to the proper rate base, proper allowances for operating expenses, reasonable allowances for taxes and reasonable deductions for depreciation; by insisting that the Commission make specific findings of fact, rather than mere conclusions or inferences

of fact;[*] and by insisting on the strict application of the fundamental rule of administrative decision, that the order be supported by the findings and that the findings be supported by the evidence.

GREGORY HANKIN, *Commissioner.*

OCTOBER 24, 1942.

Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

Commissioner HANKIN, dissenting:

On October 13, 1942, this Commission issued Order No. 2401 in which it ordered the Washington Gas Light Company to increase its rates, despite the provision in the Act of October 2, 1942, which prescribed that no public utility may make any general increase in its rates which were in effect on September 15, 1942, unless it first gave thirty days' notice to the President, or his agent, and consented to his timely intervention before the regulatory agency having jurisdiction to consider such increase.

The Price Administrator, acting in behalf of the Director of Economic Stabilization (the agency designated by the President to receive such notice) filed a petition with this Commission in which he prayed that the order of October 13, 1942, be vacated, and that he be permitted to intervene in this proceeding. On October 23, 1942, the Commission issued Order No. 2404, in which the record of the proceeding was reopened for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401"; the request that the order be vacated was ignored, and the case was set for a formal public hearing on November 2, 1942.

On October 31, 1942, the Price Administrator, acting in behalf of the Director of Economic Stabilization, filed another

[*] *Saginaw Broadcasting Co.* vs. *F. C. C.*, 96 F. (2d) 554.

petition asking that Order No. 2404 be amended. He asked that Order No. 2401 be vacated or at least stayed, and that the proceeding be reopened to afford the Director of Economic Stabilization an opportunity to intervene in this case without the limitations imposed in Order No. 2404 or the limitations imposed on the Price Administrator when he intervened in the original hearing.

1. The request of the Director, that if the order is not vacated, it should at least be stayed, it seems to me, should be granted as a matter of course. A denial of this request is contrary to the spirit of our statute. Paragraph 64 of our statute [37] provides that when an application for reconsideration is filed, the filing of the application itself shall act as a stay of the Commission's order; and if the application is granted, the stay must continue until the final disposition of the case. Apparently it was the Congressional intent that whenever the Commission hears a case, it should do so with an open mind, and that the petitioner have a fair opportunity to demonstrate

[37] "PAR. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the Supreme Court of the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

"That any public utility or any other person or corporation affected by any final order or decision of the Commission may, within thirty days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility, or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The Commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the Commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted the Commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided*, That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined."

the righteousness of his cause, without feeling that there is already an operative order staring him in the face. If the granting of an application for reconsideration by any person affected automatically stays the Commission's order, then *a fortiori* the granting of an original hearing to a petitioner of no lesser importance than the Director of Economic Stabilization, a statutory agent of the President of the United States, should not be beclouded by a previous order issued. While there is no express provision in the statute that the order be stayed pending this particular type of hearing it seems to me that the requirement of staying the order would flow by necessary implication from Paragraph 64 of our statute.

2. I think that the order should be vacated and the case reopened, because both Order No. 2401 and Order No. 2404 are erroneous, both as to the facts and the law of the case. I have set forth my reasons in the dissenting opinions filed with these orders. I repeat briefly the reasons stated therein in support of my view that the present petition should be granted, namely, that the Commission erred in the following particulars:

ERRORS AS TO PROCEDURE

I. The Commission has so far departed from the usual course of proper administrative procedure, and has so acted contrary to the rules of proper procedure, that it deprived the interveners and the public of a full and fair hearing, contrary to due process in its primary sense, in that

1. The Commission refused to postpone the hearing set for August 18, 1942, and to afford reasonable time to prepare testimony, despite the fact that it became evident at the prehearing conference, held only four days prior thereto, that neither the Company, nor the intervener, nor the Commission were prepared to develop the facts and the law of the case.

2. The Commission, acting without authority of law and contrary to law, granted the Company's motion to strike, and sustained objections to, questions asked by one of the Commissioners concerning the correctness of the rate base and concerning other matters necessary for a correct determination of the facts of this case.

3. The Commission, while granting the Price Administrator the right to intervene in the proceedings, at the same time hampered the intervener in developing the facts and the law of the case.

(a) By constantly limiting him to a purported "scope of hearing", which scope was so ill-defined that it was not and could not have been followed even by the Commission itself.

(b) By permitting Counsel for the Company to dominate the proceeding and constantly to annoy and interfere with Counsel for the intervener.

(c) By permitting officers of the Company to sneer and jeer at the spokesmen for the various citizens associations, and even at one of the Commissioners who sought to develop the facts of the case.

(d) By exhibiting such bias and prejudice to any view other than that favored by the Company as to question whether information furnished by the Commission's Chief Accountant to one of the Commissioners was furnished by him in his capacity as an accountant.

4. The Commission set up an indeterminate "scope of hearing" under the so-called sliding scale arrangement, excluded evidence on the theory that it went beyond the purported scope, except when the Washington Gas Light Company assented to have such evidence admitted, thus, in effect, surrendering to the Company the function and power to rule on admissibility of evidence.

5. The Commission excluded evidence, and afforded no opportunity to present evidence, relating to the correct rate base and to the proper amount of depreciation or retirement expense deductible from operating revenue, in the determination of just and reasonable rates chargeable by the Washington Gas Light Company.

6. The Commission, while purporting to grant a petition for intervention by the Price Administrator, acting in behalf of the Director of Economic Stabilization, has so limited the scope of his evidence as to render the intervention a nullity.

7. Orders Nos. 2401 and 2404 did not and do not represent the action of the Commission as a body corporate, but were

and are in truth and in fact the action of the Commissioners acting individually since.

(a) The Commission itself never considered the facts or the law of the case, prior to issuance of Orders Nos. 2401 and 2404, except the one question relating to the applicability of the Act of Congress of October 2, 1942, To amend the Price Control Act of 1942.

(b) No deliberations or conferences were had by the Commission to consider the facts and reasons set forth in the minority opinions relating to these orders.

(c) The Commission failed and refused to follow its own rule governing the issuance of orders and opinions in cases where there is a division within the Commission.

ERRORS AS TO THE RATE BASE

II. The Commission committed a number of prejudicial errors with respect to the rate base of the Washington Gas Light Company, to wit:

1. The Commission erred in failing to make basic findings which would lead to the conclusion as to what constitutes the proper rate base for determining just and reasonable rates, as required by law.

2. The Commission erred in arbitrarily assuming that the proper rate base was $28,088,332.

3. The Commission erred in failing to hold that the rate base of $28,088,332 was inflated by at least $1,055,549.52.

4. The Commission erred in holding that the computation of the rate base under the sliding scale arrangement governed the determination of just and reasonable rates in this case, irrespective of whether or not such rate base was factually and legally a proper rate base.

ERRORS AS TO DEDUCTIONS FROM OPERATING REVENUE

III. The Commission erred in a number of particulars with respect to the operating expenses deductible from operating revenues for the purpose of computing the net return, to wit:

1. In failing to make findings as to the basic facts which would show the amount of operating expenses properly allow-

able as deductions from operating revenue in the computation of just and reasonable rates.

2. In arbitrarily concluding that the operating expenses allowable as deductions totalled $7,301,988.67; and in arbitrarily concluding that all items aggregating this amount were in accordance with the Uniform System of Accounts prescribed by the Commission and constituted reasonable expenses.

3. In failing to hold that the Washington Gas Light Company had failed to prove that items aggregating $389,098.33, purporting to represent services on customers' premises, constituted operating expenses chargeable to Account No. 769 of the Uniform System of Accounts, rather than expenses connected with the Company's merchandising and jobbing department, chargeable to Account No. 520 of the prescribed System of Accounts, and not deductible as operating expense.

4. In failing to hold that the said items aggregating $389,098.33, representing services on customers' premises, were, according to Section 8 of Order No. 2098, issued August 26, 1941, chargeable to the individual customers, and not to the rate payers generally, and that, therefore, these amounts in question were not deductible as operating expense.

5. In holding, in effect, that items aggregating $216,072.27 were properly chargeable to promotional expenses; and in failing to disallow these items on the ground that the Company has failed to show

(a) That none of these items were chargeable to merchandising and jobbing;

(b) What part, if any, of these items constituted expenses for obtaining new business, as distinguished from keeping old customers.

6. In failing to find and to hold that a contribution in the sum of $1,668.30 made by the Washington Gas Light Company to the Institute of Gas Technology constituted a donation not chargeable to operating expenses.

7. In holding, in effect, that association dues and contributions, including those paid to propaganda organizations, were properly chargeable, in the sum of $975.00, as operating expense and deductible from gross revenue; and in failing to hold that these items are not chargeable to the rate payers.

because the Company had made no showing that these payments were made for the purpose of, and that they resulted in, the improvement of gas service to the public.

8. In holding that the salaries paid by the Washington Gas Light Company to its officers and executives were reasonable for rate-making purposes as charges against the rate payers; in failing to hold that the Company had made no showing as to the reasonableness of the amounts paid; in failing to hold that the amounts chargeable against the rate payers should not exceed the salaries paid to persons in the public service in positions requiring comparable amounts of work, effort, knowledge, and ability; and in failing to find and to hold that the salaries paid to officers and executives were at least $50,966.50 in excess of the reasonable amounts properly deductible from operating revenue for rate-making purposes.

9. In allowing capital stock taxes, totalling $48,155.11, as a deduction from operating revenue; and in failing to hold that capital stock taxes, being imposed on the privilege of doing business in corporate form, are payments which inure solely to the benefit of the stockholders, are not chargeable to the rate payers, and are, therefore, not deductible from operating revenue for rate-making purposes.

10. In finding, contrary to the evidence, that the income tax rate paid by the Company in 1941, namely 31%, constituted ordinary and normal income taxes deductible from gross revenue; in failing to find that 19% constituted the ordinary and normal rate, and that anything in excess of such rate constituted extraordinary and abnormal taxes imposed on the Company as its burden in the prosecution of the present war; in failing to hold that such taxes are not chargeable to the rate payers, and that the disallowance of the deduction should be increased by the additional sum of $143,706.30.

11. In failing to hold that an item of $439.05, paid for expenses in connection with work done for the Company on excess profits taxes, is not deductible from operating revenue.

12. In computing depreciation on the basis of the entire rate base, including non-depreciable property, and in computing depreciation expense as being 4% of the depreciation reserve, while permitting a rate of return of 6½% on the un-

depreciated rate base; in holding that the depreciation expense formula adopted in the sliding scale arrangement governed the amount of the deduction allowable as depreciation expense; in failing to hold that the formula adopted in the sliding scale arrangement was contrary to Paragraph 16 [*] of the statute; and in failing to hold that the allowance for depreciation expense should be reduced to $227,338.01.

ERRORS AS TO RATE OF RETURN

IV. The Commission failed to make any findings of basic facts which would lead to the conclusion that a return of 6½% of the undepreciated rate base, less 4% of the depreciation reserve, constituted a fair and reasonable return; and in failing to hold that, in the absence of evidence to the contrary, a return of 6% is ample as a fair and reasonable return under the present economic conditions.

ERRORS AS TO INCREASE IN RATES

V. The Commission erred in ordering an increase in rates totalling in excess of $200,000, without a finding to the effect that the existing rates are unreasonably low or confiscatory; in failing to find that the existing rates are unreasonably high or excessive and that the rates under the sliding scale arrange-

[*] "PAR. 16. That every public utility shall carry a proper and adequate depreciation account. The commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. These rates shall be such as will provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the commission. The commission may make changes in such rates of depreciation from time to time as it may find to be necessary. The commission shall also prescribe rules, regulations, and forms of accounts regarding such depreciation which the public utility is required to carry into effect. The commission shall provide for such depreciation in fixing the rates, tolls, and charges to be paid by the public. All moneys in this fund may be expended in keeping the property of such public utility in repair and good and serviceable condition for the use to which it is devoted, or invested, and, if invested, the income from the investments shall also be carried into the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this paragraph, unless with the consent and by order of the commission."

ment should be reduced in an amount totalling $617,874.36; in failing to hold that in view of changed conditions the sliding scale arrangement should not be applied and that the rates should be reduced in an amount totalling $1,009,207.04.

VIOLATION OF ACT OF OCTOBER 2, 1942

VI. In issuing its Order No. 2401, the Commission acted in disregard of and contrary to the Act of October 2, 1942, To amend the Price Control Act of 1942, in that

1. It issued an order directing an increase in rates without having the Company first give notice to the Director of Economic Stabilization and consent to his timely intervention.

2. It made the order retroactive to September 1, 1942.

3. It held in effect that the intervention previously granted to the Office of Price Administration constituted sufficient compliance with the Act of Congress, whereas in truth and in fact the intervention was so beset with limitations that it was rendered a nullity.

4. In issuing Order No. 2404, it failed to vacate Order No. 2401.

5. It failed to reopen the case for the purpose of permitting the Director of Economic Stabilization to develop the facts and the law of the case; for the purpose of requiring the Washington Gas Light Company to prove its proper rate base, proper allowances for operating expenses, reasonable allowances for taxes and reasonable deductions for depreciation; for the purpose of making specific findings of basic facts (based upon competent evidence), as distinguished from mere inferences or conclusions of fact; and for the purpose of arriving at conclusions of fact and law, which would be supported by proper findings.

6. By permitting the Director of Economic Stabilization to intervene for the purpose of adducing "evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401", without permitting him to go into all the facts and law pertaining to the rate determination in this case, the Commission imposed on him a meaningless and impossible task, thus in effect denying him the right to intervene.

Because of the above errors, I believe that both Orders Nos. 2401 and 2404 are void. Order No. 2401 should be vacated, and Order No. 2404 should be amended in accordance with the request of the Director of Economic Stabilization.

3. This brings me to the request made that the Director of Economic Stabilization be permitted to intervene, without the limitations imposed. What is the requirement of the statute? The Act of October 2, 1942, provides, in Section 1 thereof:

> The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, * * * to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice * * *.

In subsequent sections the Act sets out the exceptions to this great grant of power to the President to adjust prices to the extent *he finds necessary* for the purposes stated. Query: Does the above *proviso* also operate as an exception? We have been referred to statements made on the floor of both houses of Congress to the effect that this proviso does operate as an exception to the power granted to the President. These statements by members of the Congress would have constituted pertinent evidence of the collective Congressional intent, if the language of the statute were uncertain and ambiguous, but not when the language is so clear that it requires no resort to extraneous sources of interpretation.

Had Congress intended to make an exception to this grant of power in favor of common carriers and other public utilities, it would have undoubtedly used appropriate language to express such intent by including it among the other exceptions. The proviso is not an exception, and does not diminish the power granted to the President. It is an emphasis of an additional obligation. It is a direction that, while private persons may increase their prices subject to limitations which may be imposed by the President, the common carriers and other public

utilities may not do so without giving the required notice and consent to intervention, but still subject to limitations imposed by the President.

Thus Congress has not disturbed the powers and functions of the regulatory utility agencies, except to the extent that (1) it provided for intervention by the President's agent, and (2) it made utility rates, like any other prices, subject to the paramount power of the President to make adjustments to aid in the effective prosecution of the war or to correct gross inequities. Is it conceivable that Congress, in making this extraordinary grant of power to the President, intended that if he or his agent did seek to intervene, the regulatory authority may nevertheless show him the door? I cannot believe it. If this were to happen, the President could undoubtedly invoke his power under the Act of October 2nd, and make adjustments in rates which would correct such gross inequities.

Let us suppose, however, that the proviso did constitute an exception to the power granted to the President. Then the exception must be strictly construed. Can we then so construe it that by this exception Congress made the application of this Presidential power, granted in times of greatest stress, depend largely on the subordinate agencies of the Federal, State or even Municipal governments who could at will exclude or limit the intervention by the President or his agent? Whichever way one examines this statute, the conclusion is inescapable that the right of intervention is granted by the statute, not by the respective agencies, and, the statute contains no words of limitation on this right to intervene. It gives the Director of Economic Stabilization, as the agent of the President, the right to intervene in any case in which a rate increase is sought. The purpose of the intervention is to prevent any unjustifiable increase in rates. To this end he may show that an increase in rates would not be justifiable, that the existing rates are not unreasonably low or confiscatory, or that in view of present conditions the Company will be able to continue functioning and rendering service without an increase in rates. In a rate proceeding this opens the way to the examination of all elements entering into the rate determination, and if in the course of this proceeding it becomes evident that the existing rates are

unreasonably high, it becomes the duty of the regulatory authority to order a reduction in rates.

Has this Commission recognized the President's, or his agent's, right so to intervene? It limited his intervention to prove—what? That the increase ordered, the $200,000 will have an *inflationary effect!* It is indeed puzzling what this means.

At the hearing on the petition to amend Order No. 2404, the present Chairman disclosed what he meant by inflationary effect, by reading into the record the definition of the term "inflationary". It means giving rise to "disproportionate and relatively sharp and sudden increase in the quantity of money or credit, or both, relative to the amount of exchange business". In other words, the Chairman added, "when your dollar purchases less than it formerly did it is inflationary". Substituting this meaning for the words used in Section 1 of Order No. 2404, the Director of Economic Stabilization was permitted to intervene for the purpose of showing that upon the increase of gas rates by $200,000, the purchase value of the dollar will drop. It may well be assumed that such result will not follow from the increase ordered, not even if the Commission had ordered an increase many times as large.

If this were the meaning of the Act of October 2nd, that the Director may be permitted to intervene for such purpose, then Congress would be legislating something which is absurd. No public utility desiring to remain in the business will so increase its rates that the amount of the increase will lower the value of the dollar. No regulatory agency, no matter how deluded, will order such an increase. I cannot attribute to Congress such absurd result.

The most that can be expected from *any* increase in utility rates is an imperceptible inflationary *tendency*, rather than an inflationary *effect*. The Commission itself has used the words "inflationary effect" in this sense, when, in disallowing excess profits taxes in the sum of $43,928.02, it did so "in order to prevent the *direct inflationary effect* which such allowance would invite". Surely the Commission did not mean that if the $44,000 were allowed as a deduction from operating revenue, the purchasing value of the dollar would drop. Surely the

Commission did not mean that $44,000 would have a *direct inflationary effect*, while $200,000 could not conceivably "have material inflationary tendencies", as the Commission said.

But then the question arises: Why will $44,000 in taxes (least inflationary in character) have an inflationary tendency, while $200,000 in profits (most inflationary in character) will not? Upon what facts has the Commission concluded that the $44,000 would have an inflationary tendency? I find none in the record. It must then be that the Commission arrived at this conclusion as a matter of common knowledge. And rightly so, for while no inflationary tendency can be perceived from any given increase in prices, any increase in times like the present has a *tendency* to increase other prices, until there is a cumulative *effect* which when perceived has already done its destructive work. If the Commission can take judicial notice of the inflationary tendency of an increase in rates in the sum of $44,000, why can it not take judicial notice of the same result in an increase five times as great? The Commission cannot escape this dilemma by dividing the increase among all consumers and calling it an increase of 3¢ per month. If this increase in rates means the much publicized 3¢ per month per domestic consumer, then the $44,000 means ⅗ of 1¢ per domestic consumer; if the $200,000 means an increase of 1/37 of 1% in the cost of living index, then the $44,000 means an increase of 1/200 of 1% in the cost of living index.

Let us suppose, however, that there is some justification for the difference, i. e. for taking judicial notice of the inflationary tendencies of the $44,000 and for requiring proof as to the $200,000. Upon what evidence, upon what theory of proof, could such tendencies be attributed to the $200,000 increase allowed by Order No. 2401? I asked Counsel for the Company, Counsel for the Commission and Counsel for the Director of Economic Stabilization to outline the method of proof they would follow in order to show the inflationary tendencies or inflationary effects which this increase in rates would entail. None of them could give an answer. It was evident, upon the mere raising of the question, that the Commission assigned an impossible and meaningless task to the Director of Economic

Stabilization. As a matter of fact, it was not and is not the intention of the Commission to allow the Director of Economic Stabilization to intervene.

This also brings up the question whether the Company has actually complied with the provision of the Act of October 2nd, that it consent to the intervention. The evidence shows that, immediately upon the issuance of Order No. 2401, the Company addressed a letter to the Director of Economic Stabilization notifying him of the increase in rates. This letter contained no expression of consent to his intervention in this proceeding. On October 17th, the Company addressed another letter to the Director of Economic Stabilization in which it attempted to show that it had already assented to intervention by the Office of Price Administration in the original hearing, implying that the Company did not need to comply with the Act of October 2nd. It was only after the Commission had issued Order No. 2404, limiting the Director of Economic Stabilization to an impossible and meaningless task, that the Company, on October 30th, wrote a third letter, this time to the Commission, to the effect that it consented to intervention by the Director of Economic Stabilization. Asked whether this letter meant that the Company consented to an unlimited intervention by the Director of Economic Stabilization, or whether it meant that the consent was only to such intervention as was outlined in Order No. 2404, Counsel for the Company found great difficulty in giving an unequivocal answer. Finally the answer came that the Company's consent was for an intervention "without strings attached". It was evident to me, however, that the consent was a mere empty gesture, for the Company already knew that the Commission was not inclined to permit any intervention to the Director of Economic Stabilization which would develop all elements entering into rate making in the present proceeding.

As I said in my dissent on Order No. 2404, in discussing the Commission's duty under the Act of October 2, 1942: "Could the Commission then say: Let the Company give notice, let it consent to intervention by the Director of Economic Stabilization, we shall render the Act impotent by denying any petition to intervene or by so limiting the intervention as to render

it useless? To ask the question is to answer it." This is just what happened in this case. The Company's consent and the intervention allowed had only form, but no substance.

GREGORY HANKIN, *Commissioner.*

NOVEMBER 4, 1942.

Before the Public Utilities Commission of the District of Columbia

P. U. C. No. 3306, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS FOR SERVICE OF THE WASHINGTON GAS LIGHT COMPANY

PETITION FOR RECONSIDERATION

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, an intervenor and a party affected by the order of the Commission herein, and moves that the Commission reconsider its orders of October 13, 1942, October 23, 1942, and November 9, 1942, in this proceeding, and in support thereof alleges the following errors:

1. The Commission erred in issuing its Order No. 2401 of October 13, 1942, without giving the Director of Economic Stabilization the opportunity of the notice required by the Act of October 2, 1942 (Pub. Law. 729; 77th Cong. 2d Sess.), amending the Emergency Price Control Act of 1942, and without giving the Director of Economic Stabilization the opportunity of timely intervention as permitted by said Act.

2. In issuing its Order No. 2404 of October 23, 1942, the Commission erred in restricting the Director of Economic Stabilization to the presentation of "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401."

3. In issuing its Order No. 2404 of October 23, 1942, the Commission erred in refusing to reopen the proceeding for the purpose of receiving evidence and argument on behalf of the Director of Economic Stabilization.

4. In issuing its Order 2404 of October 23, 1942, the Commission erred in limiting the intervention and participation

of the Director of Economic Stabilization in this proceeding.

5. The Commission erred in its Order No. 2404 of October 23, 1942, and November 9, 1942, in not granting the request of the Director of Economic Stabilization that Order No. 2401 of October 13, 1942, be vacated.

6. The Commission erred in refusing to hold that the dominant principle governing the determination of the rates and charges of the Company is the government's program to control inflation, and to stabilize the cost of living by preventing all future avoidable increases thereof as provided by Congress in the Emergency Price Control Act of January 30, 1942, as amended by the Act of October 2, 1942, and as enunciated by the President in his Executive Order No. 9250 dated October 2, 1942, and the policies of the Director of Economic Stabilization and the Office of Price Administration.

7. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that the Company would be subject to undue hardship if it continued to operate at existing rates.

8. The Commission erred in granting an increase in rates and charges since it appeared upon the Company's figures that after the deducting of all expenses, including excessive charges for depreciation expense and income taxes, the Company was earning substantially 5% upon the agreed undepreciated rate base and in failing to hold that this was an adequate return in the light of current economic conditions and the government's program to prevent inflation and to prevent further avoidable increases in the cost of living.

9. The Commission erred in approving and ordering an increase in the absence of a clear and convincing showing that existing rates and charges were unreasonably low.

10. The Commission erred in prescribing and approving increased rates and charges without a finding that presently effective rates and charges are unjust, unreasonable, unreasonably low and not sufficiently compensatory.

Wherefore petitioner prays that the Commission find, and so order upon reconsideration of its orders of October 13, 1942 October 23, 1942, and November 9, 1942; (1) That the order of October 13, 1942, in this proceeding should be vacated and

rescinded; (2) That the proceeding should be reopened for the purpose of receiving further evidence and hearing further argument herein; (3) that the Director of Economic Stabilization should be allowed the right of intervention without limitation, and should be permitted to file a brief in this proceeding; and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator, Office of Price Administration
On Behalf of James F. Byrnes
Director of Economic Stabilization
By DAVID GINSBURG,
General Counsel
NATHANIEL L. NATHANSON
Assistant General Counsel
HARRY R. BOOTH
Utilities Counsel, Legal Division
Office of Price Administration

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing application for reconsideration upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 12th day of November, 1942.

HARRY R. BOOTH.

Public Utilities Commission of the District of Columbia

Order No. 2422, Formal Case No. 316

NOVEMBER 16, 1942.

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF WASHINGTON GAS LIGHT COMPANY.

Upon careful consideration of the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization.

It is ordered:

That the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, on behalf of James F. Byrnes, Director of Economic Stabilization, be, and the same is hereby, denied.

By the Commission. (Commissioner Hankin dissenting).

E. J. MILLIGAN
Executive Secretary.

A True Copy:

[SEAL] N. H. HETZEL
Chief Clerk.

AD.

In the District Court of the United States for the District of Columbia

Civil Action No. 17805

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLANT, BY LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ, BEING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLEES

SEPARATE ANSWER OF GREGORY HANKIN, APPELLEE

Now comes Gregory Hankin, a member of the Public Utilities Commission of the District of Columbia and one of the Appellees in the above-entitled cause, and appearing on behalf of himself says:

1. That he admits all and singular the allegations contained in the Petition of Appeal filed by James F. Byrnes, Director of Economic Stabilization, by Leon Henderson, Price Administrator of the Office of Price Administration;

2. That he agrees that Orders Nos. 2401, 2404 and 2418, issued by the Public Utilities Commission and appended as Exhibits A, C and E to the Petition of Appeal are illegal and void for the reasons set forth in the said Petition of Appeal and

for additional reasons included in the opinions of your Appellee dissenting from the said orders of the Commission.

Wherefore, your Appellee, in behalf of himself, confesses error on the part of the Public Utilities Commission and says that the relief sought by the petitioner should be granted, that the aforementioned orders of the Commission should be vacated and set aside, and that the cause be remanded to the Commission for further proceedings, with directions:

1. To afford to the Appellant full opportunity to intervene on all questions of law and fact pertaining to an orderly and proper disposition of the case;

2. To reopen the case for the presentation of further evidence on all issues of fact relating to the reasonableness of the rates charged by the Washington Gas Light Company; and

3. To make specific findings of fact and conclusions of law to the end that the Commission's order shall be supported by the findings, which in turn shall be supported by the evidence.

Respectfully submitted:

GREGORY HANKIN,

Commissioner, Public Utilities Commission of the District of Columbia,

Appellee.

Service of a copy of the foregoing Answer is hereby acknowledged this — day of December 1942.

——— ———, *Counsel for Appellant.*

This is to certify that I have this 8th day of December, 1942, mailed copies of this answer to the attorneys for the parties in this case.

GREGORY HANKIN.

Part II

PLEADINGS AND OTHER PAPERS DESIGNATED BY APPELLEE BROWN

Before the Public Utilities Commission of the District of Columbia

Formal Case No. 316

In the Matter of THE INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS, AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR LEAVE TO INTERVENE

May It Please The Commission:

Leon Henderson, Price Administrator for the Office of Price Administration, respectfully petitions for leave to intervene, and in support thereof, makes the following representations:

1. Petitioner is Price Administrator of the United States, and Administrative Officer of the Federal Government, with offices in Washington, D. C. This office was created by the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong.,) for the purpose, among others, of:

(a) Stabilizing prices and preventing speculative unwarranted and abnormal increases in prices,

(b) Eliminating and preventing profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities caused by or contributing to the national emergency.

(c) Assuring that defense appropriations are not dissipated by excessive prices.

(d) Protecting persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent upon life insurance, annuities and pensions, from undue impairment of their standard of living; and

(e) Preventing a post-emergency collapse of values.

(Section 1 (a) of the Emergency Price Control Act of 1942.)

2. The program of the Office of Price Administration to stabilize commodity prices and costs of living is essential to the success of the war effort.

3. In accordance with the purposes of the Emergency Price Control Act, the Office of Price Administration has undertaken to stabilize commodity prices and the cost of living throughout the country by a series of Maximum Price Regulations. Indeed, general price increases have appeared to be such a grave threat to the efficient production of war materials and to the stability of the national income, that the Office of Price Administration, within the limits of statutory authorization has established maximum selling prices for all commodities and services. The immediate purpose of such regulation is to guarantee to the American people that every living cost will remain stable, and that the cycle of increasing prices, increasing wages, leading to disastrous inflation, may be averted. That is a prerequisite to the further measures which are necessary to insure war-time stability in the economy. Stable living cost means stability in the real wages of the worker. Increases in the cost of living bring about the need for a constant revision of wage contracts, constant bargaining and negotiations, and the certain prospect of interrupted production; normal collective bargaining processes are strained, perhaps broken, and war production is threatened with being shackled, disrupted, or even paralyzed.

4. Washington Gas Light Company (hereinafter sometimes referred to as the Company) is a public utility engaged in the business of supplying gas service to domestic, commercial, and industrial consumers in the District of Columbia at rates and charges which are subject to the jurisdiction of the Public Utilities Commission of the District of Columbia (hereinafter sometimes referred to as the Commission).

5. It appears that payments for gas service represent a regular item in the cost of living of a vast majority of residents in the District of Columbia.

6. By its order of December 13, 1935, the Commission established a sliding-scale arrangement for determining the rates and charges which the Company shall be allowed to demand and collect for supplying such gas service.

7. Pursuant to the provisions of said sliding-scale arrangement the Commission has entered upon an investigation for

the purpose of determining among other things, the amount to be applied for the decrease or increase of rates during the "Rate Year" commencing September 1, 1942, and has directed that a hearing be held thereon commencing August 18, 1942.

8. Washington Gas Light Company contends that its net earnings during the fiscal year (Test Year) ended June 30, 1942, were approximately $464,000 less than it was entitled to earn under the provisions of said sliding-scale arrangement. It, therefore, seeks to have an increase of approximately $387,122 applied during the "Rate Year" commencing September 1, 1942, and requests that its schedule of rates be adjusted accordingly.

9. It is contended by the Company that according to the provisions of said sliding-scale arrangement of December 13, 1935, the Company is entitled to such increase in rates and charges to compensate it for the difference between the actual return earned during the last fiscal (Test) year and the return which it was permitted to earn under the arrangement.

10. It appears that the claimed deficit in earnings during the past fiscal year is predicated in large part upon alleged estimated increases in federal income taxes levied or to be levied upon income received in the period from July 1, 1941, to June 30, 1942, over the preceding year.

11. The approval of an increase in utility rates because of increased federal income taxes would be contrary to the intention of the Congress, inflationary in character and adversely affect the program and policies of the Office of Price Administration to stabilize prices.

12. It appears that this is the first time since the United States entered the war that the Commission is called upon to make a determination or to fix rates under said sliding-scale arrangement. The application of the arrangement should be reconsidered in the light of the Government's program to prevent inflation and to stabilize the cost of living.

13. The question of under what circumstances rates and charges for gas service, should be increased during this period of national emergency resulting from the war, is one of basic national importance, in which the Office of Price Administration has a substantial interest.

Now, therefore, your petitioner prays that the Commission enter an order granting him leave to intervene and become a party to this proceeding.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By: DAVID GINSBURG
General Counsel
HARRY R. BOOTH
Utilities Counsel

Before the Public Utilities Commission of the District of Columbia

P. U. C. No. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR THE REOPENING OF THE PROCEEDING FOR THE PURPOSE OF RECEIVING ADDITIONAL TESTIMONY

On August 18, 1942, the Commission granted the Price Administrator of the Office of Price Administration (sometimes hereinafter referred to as Petitioner) leave to intervene and become a party to this proceeding.

On September 14, 1942, counsel for the Price Administrator of the Office of Price Administration, in consideration of the several statements of the Commission as to the scope of the matters at issue in this proceeding, orally moved the Commission to issue appropriate orders under which the Commission could, in this proceeding, reconsider the provisions of the "sliding-scale arrangement" in the light of present economic conditions, and could consider all factors ordinarily deemed necessary to a determination of just and reasonable rates and charges for service rendered by public utilities (Tr. 788–796).

Such motions were taken under advisement by the Commission (Tr. 796). However, the hearings were concluded on September 14, 1942, and the Commission has not made any ruling upon said motions.

Wherefore, your Petitioner renews said motions and respectfully requests that the Commission issue appropriate orders to:

Reopen this proceeding and direct that further evidence be taken with respect to:

1. The effect of present changed economic conditions upon the provisions of the "sliding-scale arrangement" made in 1935.

2. The necessity for revision of the provisions of the "sliding-scale arrangement" because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction.

3. The relationship and effect of the Federal Government's program to control inflation and stabilize the cost of living to the "sliding-scale arrangement" and the proceeding.

4. All other factors which are ordinarily necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By: DAVID GINSBURG
General Counsel
HARRY R. BOOTH
Utilities Counsel

Before the Public Utilities Commission of the District of Columbia

P. U. C. 3305, Formal Case No. 316

In the Matter of INVESTIGATION OF RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF THE WASHINGTON GAS LIGHT COMPANY.

PETITION FOR RECONSIDERATION

Comes now, Leon Henderson, Price Administrator of the Office of Price Administration, an intervenor and a party affected by the order of the Commission herein, and moves that

the Commission reconsider its order of October 13, 1942, in this proceeding, and in support thereof alleges the following errors:

1. The Commission erred in refusing to hold that the dominant principle governing the determination of the rates and charges of the Company is the government's program to control inflation, and to stabilize the cost of living by preventing all future avoidable increases thereof.

2. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that the Company would be subject to undue hardship if it continued to operate at existing rates.

3. The Commission erred in granting an increase in rates and charges since it appeared upon the Company's figures that after the deduction of all expenses, including excessive charges for depreciation expense and income taxes, the Company was earning substantially 5% upon the agreed undepreciated rate base, and in failing to hold that this was an adequate return in the light of current economic conditions and the government's program to prevent inflation and to prevent further avoidable increases in the cost of living.

4. The Commission erred in approving and ordering an increase in rates and charges in the absence of a clear and convincing showing that existing rates and charges were unreasonably low.

5. The Commission erred in prescribing and approving increased rates and charges without a finding that presently effective rates and charges are unjust, unreasonable, unreasonably low and not sufficiently compensatory.

6. The Commission erred in entering the order of October 13, 1942, without a showing that the Company had complied with Section 1 of the Act of October 2, 1942, amending the Emergency Price Control Act of 1942, and with full knowledge that the Company had failed to give the required notice to and consent to intervention by the Director of Economic Stabilization at the time of the entry of the order of October 13, 1942.

7. The Commission erred in denying the motion of the Price Administrator, filed on his own behalf, requesting that this proceeding be reopened and that further evidence be taken with respect to: (1) The effect of present changed economic condi-

tions upon the provisions of the sliding-scale arrangement made in 1935; (2) the necessity for revision of the provisions of the sliding-scale arrangement because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of Federal income taxes as an operating revenue deduction; (3) the relationship of the Federal Government's program to control inflation and stabilize the cost of living to the sliding-scale arrangement and this proceeding; and (4) all other factors which are necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

8. The Commission erred in limiting the issues and in otherwise restricting the scope of this proceeding and thereby denied the petitioner, and other intervenors, a full and fair hearing.

9. The Commission erred in fixing and prescribing increased rates and charges to be made effective retroactively as of September 1, 1942, without statutory authority to make any rates and charges effective as of a date prior to the approval thereof.

10. The Commission erred in ruling "that questions pertaining to basic elements of the sliding-scale arrangement described in Order No. 1458, dated December 13, 1935, are not within the scope of the present proceeding". (Tr. 475).

11. The Commission erred in ruling that it might give particular and individual consideration to the propriety of allowing excess profits tax or income tax as an operating expense although the sliding-scale arrangement does not specifically provide therefor, but that it could not reconsider other phases of the sliding-scale arrangement.

12. The Commission erred in limiting the rights of the petitioner, as an intervenor and a party to the proceeding, to present evidence.

13. The Commission erred in not ruling upon petitioner's oral motion made during the course of hearing which requested that, if the Commissioner be of the opinion that the order instituting this proceeding did not permit an inquiry into the basic provisions of the sliding-scale arrangement, the Commission issue appropriate orders so that the provisions of the sliding-scale arrangement might be reconsidered in the light of present economic conditions and in the light of the govern-

ment's program to stabilize the cost of living, and in the light of all other necessary factors which the Commission must as a matter of law consider in determining just and reasonable rates and charges of a public utility.

14. The Commission erred in finding that an "increase for all customers" of "2.28% in excess of rates for the preceding year" would not have "material inflationary tendencies".

15. The Commission erred in not requiring the company to sustain the legally imposed burden of proving the presently effective rates and charges to be unjust and unreasonable under existing circumstances and not sufficiently compensatory under accepted rate-making principles, and of proving the increased rates and charges to be just and reasonable.

16. The Commission erred in ruling that the rights of the Price Administrator, as an intervenor, did not permit him to "carry on a detailed investigation into the accounts of the gas company". (Tr. 476).

17. The Commission erred in ruling that its primary responsibility and duty is "to determine, in accordance with the provisions of the sliding-scale arrangement as such arrangement is now constituted, whether the Washington Gas Light Company is entitled to an increase in rates for the year commencing September 1, 1942, and the amount of such warranted increase."

18. The Commission erred in finding the proper rate base to be $28,088,322.57, and in failing to make the basic findings necessary to a determination of any proper rate base.

19. The Commission erred in failing to deduct accrued depreciation from the rate base.

20. The Commission erred in not re-examining, determining and making proper findings as to the previously determined rate base in the light of the principles enunciated by the United States Supreme Court.

21. The Commission erred in finding that because "the sliding-scale arrangement does not attempt to define operating expenses or to indicate that certain types of operating expenses should be excluded in determining the net amount available for return", operating expenses of the company could

be adjusted only "for any accounting departures during the test year; for over or under accruals in taxes, uncollectible bills, and such other accrued accounts for which adjustment is provided by the prevailing accounting classification; and to exclude those expenses allocated to gas service outside of the District of Columbia".

22. The Commission erred in finding that "the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable".

23. The Commission erred in allowing as an operating expense a charge for income tax computed at a rate in excess of 19% which was the highest rate in effect for the "normal years" 1936–1939, inclusive.

24. The Commission erred in finding "Adjusted Operating Expenses" for the year ended June 30, 1942, to be $7,301,988.67 and in failing to make the necessary basic findings with respect to the amounts of specific operating expenses properly allowable as deductions from operating revenue.

25. The Commission erred in allowing as a proper operating expense charge an amount of $216,072.27 for sales promotion expense without positive and convincing proof that the items included constitute expenses incurred in the sale of gas service and not the sale of other merchandise.

26. The Commission erred in allowing as a proper operating expense charge an amount of $389,098.33 for services on customers' premises in the District of Columbia without positive and convincing proof that the items included constitute services other than those rendered in connection with merchandising and jobbing.

27. The Commission erred in finding that the operating expenses of the company for the test year ended June 30, 1942, except the adjustments made by the Commission in its opinion, "are fair and reasonable and properly considered in the determination of rates under the sliding-scale arrangement".

28. The Commission erred in finding "Adjusted amount available for return" for the year ended June 30, 1942, to be $1,555,051.65.

29. The Commission erred in finding $1,825,740.97 as the proper return to be allowed, without evidence to support such a finding.

30. The Commission erred in finding a deficiency of $270,689.32 in return, without evidence to support such a finding.

31. The Commission erred in finding $201,424.74 to be the "Net amount available for rate increase", without evidence to support such a finding.

32. The Commission erred in not determining whether existing charges for depreciation expense were burdensome and unfair to the rate payers; in not conforming the method and charges for depreciation expense to the legal principles announced in the decision of the Supreme Court in the case of Natural Gas Pipeline Company vs. Federal Power Commission; in computing depreciation expense on a rate base which included non-depreciable property, in contravention of established legal and accounting principles and regulations; in allowing the Company a sum for depreciation expense which, according to the evidence, is improperly computed both by acceptable accounting and legal standards; in refusing to permit testimony to be given on the subject by its Chief Accountant, Mr. McElfresh, or the witness Mr. Joseph, presented by the Office of Price Administration.

33. The Commission erred in prescribing 6½ per cent as the proper rate of return which the company should be permitted to earn without having any evidence before it upon which to reach such a decision.

34. The Commission erred in not re-examining in the light of present changed economic conditions the provisions of the sliding-scale arrangement of 1935 which specify "the primary" rate of return of 6½ per cent per annum, "since what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

35. The Commission in adhering to the 6½-percent rate of return found to be proper in 1935, ignores the fact that "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally", and

erred in not requiring the presentation of evidence concerning present economic conditions.

36. The Commission erred in finding "that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding-scale arrangement".

37. The Commission erred in ruling that "This proceeding is vastly different from a proceeding involving a rate case as that term is generally understood" (Tr. 475).

38. The Commission erred in refusing to allow the petitioner to present and elicit evidence in conformity with ordinarily accepted rate-making principles for the purpose of showing whether the presently effective rates and charges of the company are just and reasonable, which evidence is necessary to a showing and determination as to whether increases thereof are inflationary or would have an inflationary effect.

39. The Commission erred in not availing itself of the "right and power" conferred by Paragraph 18 of Section 8 of the Act of March 4, 1913 (37 Stat. 974), "to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto is reserved in the commission notwithstanding any such (sliding-scale) arrangement and actual agreement".

40. The Commission erred in ruling that its duty and responsibility required strict adherence to the provisions of the sliding-scale arrangement, as construed, to the neglect of its duty and responsibility to the gas consuming public to require the company to maintain just and reasonable rates and charges.

Wherefore, petitioner prays that the Commission find, upon reconsideration of its order of October 13, 1942, and the available evidence of record in support thereof, that the presently effective rates and charges have not been proved to be unjust and unreasonable, and that no increase in the presently effective rates and charges of the Washington Gas Light Company has been proved to be just and reasonable; that the order of October 13, 1942, should be vacated, and so order; and that the

Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Respectfully submitted,

LEON HENDERSON
Price Administrator
Office of Price Administration
By DAVID GINSBURG
General Counsel
NATHANIEL L. NATHANSON
Assistant General Counsel
HARRY R. BOOTH
Utilities Counsel
Legal Division, Office of Price Administration.

Public Utilities Commission of the District of Columbia

Order No. 2423, Formal Case No. 316

NOVEMBER 16, 1942.

In the Matter of RATES, TOLLS, CHARGES, TARIFFS, RULES, REGULATIONS AND CONDITIONS OF SERVICE OF WASHINGTON GAS LIGHT COMPANY.

Upon careful consideration of the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration,

It is ordered:

That the petition for reconsideration filed in this proceeding by Leon Henderson, Price Administrator of the Office of Price Administration, be, and the same is hereby, denied.

By the Commission. (Commissioner Hankin dissenting).

E. J. MILLIGAN
Executive Secretary.

A True Copy:

[SEAL]
AD.

N. H. HETZEL, *Chief Clerk.*

In the District Court of the United States for the District of Columbia

Civil Action No. 17806

LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, APPELLANT,

v.

JAMES H. FLANAGAN, GREGORY HANKIN, AND C. W. KUTZ, BEING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLEES

SEPARATE ANSWER OF GREGORY HANKIN, APPELLEE

Now comes Gregory Hankin, a member of the Public Utilities Commission and one of the Appellees in the above-entitled cause, and appearing on behalf of himself files this answer:

1. That he admits all and singular the allegations contained in the Petition of Appeal filed by Leon Henderson, Price Administrator of the Office of Price Administration;

2. That he agrees that Order No. 2401, issued by this Commission on October 13, 1942, purporting to increase the rates of the Washington Gas Light Company is illegal and void for the reasons set forth in the said Petition of Appeal and for additional reasons set forth in the opinions of your Appellee dissenting from said Order No. 2401 and Orders Nos. 2404 and 2418, issued on October 23 and November 9, 1942, respectively.

Wherefore your Appellee on behalf of himself confesses error on the part of the Public Utilities Commission and says that the relief sought by the Appellant should be granted, that the said orders of the Commission be vacated and set aside, and that the cause be remanded for further proceedings with directions:

1. To reopen the case for the presentation of further evidence on all questions of fact relating to the reasonableness of the rates charged by the Washington Gas Light Company; and

2. To make specific findings of fact and conclusions of law to the end that the Commission's order shall be supported by the findings, which, in turn, shall be supported by the evidence.

Respectfully submitted.

GREGORY HANKIN
Commissioner
Public Utilities Commission of the District of Columbia, Appellee.

This is to certify that I have this 8th day of December 1942 mailed copies of this answer to the attorneys for the parties in this case.

GREGORY HANKIN.

In the District Court of the United States for the District of Columbia

Civil Action No. 17805

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLANT, BY LEON HENDERSON, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,

v.

JAMES H. FLANAGAN, ET AL., APPELLEES

ANSWER TO PETITION OF APPEAL AND MOTION TO DISMISS

Come now James H. Flanagan and C. W. Kutz, being members of and constituting a majority of the Public Utilities Commission of the District of Columbia, Appellees in the above-entitled action, and for answer to the Petition of Appeal in the said action, the said Appellees, and each of them, say:

1. They admit that the Washington Gas Light Company did not give notice to the Director of Economic Stabilization of the proposed increase in rates authorized by the order dated October 13, 1942 (Order No. 2401), prior to the promulgation of the said order, but that on October 15, 1942, after the said order had been promulgated, the said Company did file with the Director of Economic Stabilization a notice of the proposed increase in rates and charges and later consented to the intervention of the Director of Economic Stabilization in the pro-

ceedings before the said Commission. They admit that on October 19, 1942, the Director of Economic Stabilization, by Leon Henderson, Price Administrator of the Office of Price Administration, filed a petition with the Public Utilities Commission, praying that the order dated October 13, 1942, be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the Appellant herein be allowed to intervene and to file a brief in such reopened proceedings. They admit that by order dated October 23, 1942, the Appellant was given the opportunity of presenting evidence and that he was permitted to intervene in the reopened proceedings for such purpose. They admit that on October 31, 1942, the Appellant filed a petition, praying that the Commission amend its Order No. 2404, dated October 23, 1942, and grant the relief prayed for in the petition filed October 19th. They admit that on November 12, 1942, the Appellant filed with the Commission a petition for reconsideration, which petition was denied by order dated November 16, 1942 (Order No. 2422).

2. They deny all the remaining allegations contained in the said Petition of Appeal.

3. They aver that the petition filed by Appellant on October 31, 1942, praying for an amendment of the order of October 23, 1942, and to provide the specific relief requested in the petition filed by the Appellant on October 19th, was denied by verbal ruling at the hearing on November 2nd (transcript of record, pages 1086–1087), and that the Commission's order of November 9, 1942 (Order No. 2418), was promulgated by the Commission after consideration of the record of the second reopened proceedings upon the petition of Appellant, in which the Commission denied the petition filed by Appellant on October 19th to vacate Order No. 2401.

4. (a) For further answer to the Petition of Appeal, the said Appellees aver that the Public Utilities Commission started a complete inventory and valuation of the properties of the Washington Gas Light Company, The Georgetown Gaslight Company (later merged with Washington Gas Light Company) in March, 1932, and after public hearings, analyses, and investigation, issued its valuation reports on March 19,

1935, in Orders Nos. 1341 and 1342, finding and establishing the fair value of the properties of the said companies as of June, 1932. Thereafter the Commission began further valuation proceedings for the purpose of bringing to date the valuation of the property of the Washington Gas Light Company for the purpose of establishing a sliding-scale plan, pursuant to the provisions of Paragraph 18 of the Act creating the Commission (37 Stat. 974, 980, section 43–317, D. C. Code, 1940), and that, pursuant to such investigations and proceedings and after public hearings extending through the months of June, July, August, and October, 1935, consisting of 5,951 pages of testimony and a total of 135 exhibits, the Commission made its findings and promulgated Order No. 1458 under date of December 13, 1935, wherein a sliding scale plan was established and defined pursuant to the provisions of Paragraph 18 of the said Act. The valuation and rate proceedings leading up to the establishment of the rate base of the Washington Gas Light Company and the sliding scale plan cost the parties more than $750,000.00, and as a result thereof gas rates in the District of Columbia were reduced in the year 1935 more than $800,000.00, which reduction has continued in effect since 1935, and that by the application of the sliding scale plan since its establishment in 1935 there have been smaller rate reductions in each of the years 1936, 1938, 1939 and 1940, which reductions have continued in effect since they were made, and under the terms and provisions of the plan the operating experience of the Washington Gas Light Company for the test year beginning July 1, 1941, to June 30, 1942, for the first time since the plan has been in effect requires an increase in the rates and charges for gas service in the District of Columbia. Under the provisions of the sliding scale arrangement, the operating experience of the Washington Gas Light Company for the test year, which is defined in the plan to be from July 1st to June 30th preceding a new rate year, which begins September 1st, constitutes the basis for determining the net amount available for rate reductions or increases as the operating experience warrants. Inasmuch as there was no rate reduction for the rate year beginning September 1, 1941, the rates in effect prior to the issuance of Order No. 2401, dated October 13, 1942, were based upon the

operating experience of the Company for the test year beginning July 1, 1939, and ending June 30, 1940.

(b) The said Appellees further aver that the sliding scale arrangement requires the Commission to make annual findings of the rate base of the property of the Gas Light Company, which has been done each year since the plan was put into effect in 1935. The plan provides that, beginning with the rate base established in 1935, there shall be added thereto each year the net additions and betterments of property installed during the test year at actual cost, and that the rate base found by the Commission in Order No. 2401 constitutes a fair value of the property of the Washington Gas Light Company for rate-making purposes, based upon the actual fair value found after three years of investigation and study, plus the net additions and betterments since that time at actual cost of the property.

(c) The said Appellees aver that, pursuant to the provisions of the sliding scale plan, the Commission by Order No. 2219, dated March 20, 1942, ordered that an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Gas Light Company, and that the engineering and accounting staffs of the Commission conducted such detailed and thorough analyses of all the books and accounts of the Washington Gas Light Company during a period beginning in the month of April and extending into the month of August 1942. Pursuant to the provisions of the sliding scale arrangement and the order of investigation, the Commission, under date of July 21, 1942, gave statutory notice of a public hearing to be held beginning on August 18, 1942, "relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458".

(d) Further answering, the said Appellees aver that prior to the public hearing in the proceedings the Commission held a prehearing conference on August 14th, which was attended by the Commission's staff and counsel, and utilities counsel of the Office of Price Administration. Pursuant to the notice dated July 21st, public hearings began on August 18th, at which time

the Office of Price Administration, through its utilities counsel and with the consent of the Washington Gas Light Company, was permitted to intervene in the proceedings before the Commission within the scope of the issues raised by the order of investigation dated March 20th and the statutory notice dated July 21st stating the time, place and the matters to be investigated, all in accord with the Rules of Practice and Procedure before the Commission. The said Appellees further aver that the hearings continued on August 19th, at which time utilities counsel of the Office of Price Administration asked that the proceedings be continued to permit him time to prepare for cross-examination of witnesses and for the preparation of testimony to be adduced by him; that pursuant to such request the hearing was continued to September 4th, at which time the hearing was reconvened and continued on September 8th, 11th, and 14th, at which time the record was closed and the parties were given until September 25th to file briefs, and that utilities counsel of the Office of Price Administration filed a brief with the Commission on that date.

(e) Further answering, the said Appellees aver that upon the petition of others the said proceedings were reopened on September 30th, in which proceeding utilities counsel for the Office of Price Administration participated and on that date filed a second brief, and the record was closed for the second time on September 30th, prior to the enactment of the Act of October 2, 1942, amending the Emergency Price Control Act of 1942, and prior to the appointment of the Appellant as Director of Economic Stabilization.

(f) They further aver that under date of October 13, 1942, the Commission issued its Order No. 2401, which established new rates and charges for gas service in the District of Columbia for the rates year which began September 1, 1942, in accordance with the terms and provisions of the sliding scale arrangement, and that on October 15, 1942, after the enactment of the Act of October 2nd, the Washington Gas Light Company served upon the Appellant herein notice of the increase in rates authorized by Order No. 2401 and served upon him a copy of the said order. They further aver that thereafter, to wit, on October 19th, the Price Administrator of the Office of Price Administra-

tion, on behalf of the Appellant herein, through the same utilities counsel who had appeared in all proceedings before the Commission, cross-examined witnesses, introduced certain testimony and filed briefs, filed a petition with the Commission, in which it was asserted that the issuance of the order of October 13, 1942, without notice to the Director of Economic Stabilization and without permitting him opportunity to intervene in the proceedings, constituted a denial of his right to appear "for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities", and prayed that the order of October 13th be vacated, that the proceedings be reopened and the Director of Economic Stabilization be allowed to intervene in the reopened proceedings. Pursuant to such petition, the Appellees aver that by Order No. 2404 the Commission reopened the proceedings "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401", granted intervention for such purpose and reopened the proceedings for further hearing on November 2nd. The said Appellees further aver that counsel for the Appellant was not ready to present testimony in accordance with the request contained in the petition of October 19th in pursuance to Order No. 2404, and asked that the hearing be continued until November 4th to permit counsel to consult with his associates as to what further steps they would take in the proceeding; that at the hearing on November 4th counsel for the Appellant called to the witness stand an official of the Washington Gas Light Company as Appellant's only witness in the reopened proceeding; that the only testimony adduced by the said witness was to the effect that the amount used by the Washington Gas Light Company for Federal income taxes in its determination of the amount available for rate increase under the sliding scale plan was overstated by approximately $18,000.00; that this overstatement was due to the fact that

the Revenue Act of 1942, which had not become law at the time Order No. 2401 was promulgated, contained a provision exempting from surtaxes that portion of the Company's income paid out as preferred stock dividends, which provision was not included in the draft of the Revenue Act then before the two Houses of Congress.

(g) Further answering, the said Appellees aver that the testimony offered on behalf of the Appellant herein was not responsive to the purposes stated in his petition to reopen the proceedings before the Commission or the provisions of Order No. 2404, for the reason that the Commission in its Order No. 2401 did not accept the computation for Federal income taxes accrued on the Company's books or as stated by the witness for the Commission and that instead the Commission in its determination of rates excluded from Federal income taxes approximately $130,000.00 more than the amount shown in the Company's statement for Federal income taxes.

(h) Further answering, the said Appellees aver that the program of the Federal Government to stabilize the cost of living contemplates consideration of the increase in wage rates, and that the operating experience of the Washington Gas Light Company during the test year from July 1, 1941, to June 30, 1942, upon which the rates authorized by Order No. 2401 are predicated, shows that the Washington Gas Light Company had increases in wage rates of approximately $380,000.00 in addition to increases in other costs of production and distribution of gas, and that the increase in cost of wages was approximately $180,000.00 in excess of the total increase in rates authorized by Order No. 2401.

(i) Further answering, the said Appellees aver that the total increase in rates authorized by Order No. 2401 is only 2.28% in excess of rates that have been in existence since September 1, 1940, and that the cost of gas constitutes only 1.17% of the average cost of living in the District of Columbia, according to statistics of the Labor Department, and that, based upon the percentage increase for gas service authorized by Order No. 2401, the cost of living index would be increased by only about 1/37 of 1%; and that such increase based upon the cost of production and distribution and the cost of labor does

not tend to inflation. Further answering the said allegations, the said Appellees aver that the gas rates in effect prior to the promulgation of Order No. 2401 were based upon operating experiences of the Washington Gas Light Company for the period of July 1, 1939, to June 30, 1940, a period long prior to the Government's efforts to stabilize prices, and at a time when living costs were increasing and labor wages were being raised by approval of Governmental agencies. Further answering, the said Appellees aver that, under the rates authorized by Order No. 2401, domestic consumers using 2,500 cubic feet or less of gas per month will sustain no increase in the cost of gas, and that the average increase for all customers will be only $.03 per month; that the average increase for all space heating customers for a heating season will be only $.57 per month for a period of eight months, and that the average increase for commercial and industrial customers will be only $.46 per month. Further answering, the said Appellees aver that in its determination in Order No. 2401 the Commission gave careful consideration to all factors bearing upon the case, including the credit position of the Washington Gas Light Company under the sliding scale plan (page 11) and the ability of the Company to secure capital economically for the purpose of expanding its plant to meet demands caused by war conditions, and the ability of the Company to provide the nation's No. 1 defense area with adequate gas service (page 10).

(j) The said Appellees aver that the Chairman of the Commission, on several occasions during the proceedings before it, asked counsel for the Price Administrator of the Office of Price Administration, who was the same counsel for the Appellant in the proceedings before the Commission and in this appeal, that he advise the Commission of the aims and purposes of the Office of Price Administration during the period of the national emergency, so that it may learn the attitude of that Office as to the relation of those aims and purposes to the proceeding before the Commission, and to develop testimony along those lines which would assist the Commission in arriving at a determination of those questions.

(k) Further answering the allegations contained in subparagraph c of the paragraph numbered 1 of the Petition of Appeal, the said Appellees aver that the Commission gave

full and complete consideration to such testimony as it was able to obtain relative to the policies and aims of the Federal Government to stabilize the cost of living, and that, because of such considerations and of such findings by the Commission, there were excluded, as elements of cost in determining the rates established by Order No. 2401, Federal income taxes and excess profits taxes in the amount of $164,720.50 in order to prevent the inflationary effect that such allowances would invite; that in establishing the rates authorized by Order No. 2401 the Commission considered 31% as a reasonable rate for Federal income taxes for the test year July 1, 1941, to June 30, 1942, in spite of the fact that the Revenue Act of 1942 under consideration at that time and as finally enacted provided for a rate of 40% for Federal income taxes.

(l) For further answer, the Appellees aver that the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress), approved January 30, 1942, by Section 302 (c) specifically provided that "nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility", and that the Act of October 2, 1942, amending the Emergency Price Control Act, does not authorize the Appellant to regulate, control, or fix utility rates.

(m) The said Appellees further aver that on November 16th, after the expiration of thirty days' notice to Appellant of the increase in rates, the Washington Gas Light Company filed notice with the Commission that effective that date the rates authorized by Order No. 2401 were being put into effect.

5. (a) In answer to the allegations contained in paragraph numbered 2 and subparagraphs a to d, inclusive, thereof, the said Appellees aver that the order of the Commission dated October 23, 1942 (Order No. 2404), is a procedural order reopening the proceedings before the Commission and permitting intervention by the Appellant, and is not an appealable order; that the said order dated October 23, 1942, does not involve the merits of the determinations in the order dated October 13, 1942, which established rates, tolls and charges, and that the said order dated October 23, 1942, is not an appealable order, and the appeal therefrom does not require answer from the said Appellees.

(b) If answer to the said paragraph numbered 2 and the said subparagraphs be required, the said Appellees deny each and every allegation contained in the said numbered paragraph and subparagraphs thereof.

6. For further answer to the unnumbered paragraph beginning on page 4 of the Petition of Appeal, the said Appellees aver that if the purpose of the appeal is as stated in the said paragraph, there is a defect in parties in the said Petition of Appeal in that it is alleged that the purpose is to prevent the Washington Gas Light Company from effecting the schedules of increased rates and charges which have been determined, fixed and ordered by the Commission and to save the Appellant and the consuming public from the increase in the cost of living. The said Appellees aver that in order to accomplish such purpose the Washington Gas Light Company is a necessary party. They further aver that the rates and charges established by the order dated October 13, 1942, were in effect prior to the time this Petition of Appeal was filed.

MOTION TO DISMISS

Comes now the said Appellees by their counsel and move to dismiss the Petition of Appeal upon the following grounds:

1. That the said Petition of Appeal fails to state grounds upon which relief may be granted.

2. That the Director of Economic Stabilization is not affected by the provisions of Order No. 2401.

3. That the Appellant herein had no legal right to intervene in the proceedings before the Commission and the Commission, having granted the intervention, may control the same.

WHEREFORE, the said Appellees, having fully answered the Petition of Appeal and having moved to dismiss the same, pray that the said Petition of Appeal be dismissed.

RICHMOND B. KEECH
General Counsel,
Public Utilities Commission
LLOYD B. HARRISON,
Counsel, Public Utilities Commission
Attorneys for Appellees,
District Building.

Part III

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE PUBLIC UTILITIES COMMISSION DESIGNATED BY APPELLEE BYRNES AND BROWN

Chairman HANKIN. Mr. Prettyman, you participated in the proceeding which resulted in the adoption of the sliding scale arrangement, did you not?

Mr. PRETTYMAN. I did, yes, sir. (494)

Chairman HANKIN. As counsel for the Commission?

Mr. PRETTYMAN. Yes, sir, and because of that fact, I might say, if your Honor please, I have asked Mr. Stevens, who was counsel for the company in that proceeding, to be here, because while I feel it proper that I submit the motion to strike the question, nevertheless there would be some embarrassment if the Commission is going to inquire into that question——

Chairman HANKIN. We do not doubt your integrity, Mr. Prettyman. I would like to explain what is meant by this statement on the sliding scale arrangement:

"The Commission early recognized that if any such arrangement was to be of real value it should be sufficiently flexible in its provisions to meet changing conditions in such manner as to avoid injustice to the consumers or the companies and at the same time to permit timely benefits. To endure it must be susceptible of such modifications both as to substance and form as the facts or conditions from time to time may require."

Does not the arrangement itself contemplate by this statement that whenever the facts require a re-examination of items will be made? Now, the fact that I have in mind in (495) this case is this:

The Federal Power Commission some time ago adopted a uniform system of accounts which requires a classification of accounts in accordance with the actual legitimate cost of the property. Now, let us suppose that from a study made under the uniform system of accounts and classification of accounts that it became evident that the value of the properties of the company was $1,055,000 in excess of the original cost; does that not present a sufficient basis for going into the question of inflation of value and should that not be re-examined at this time?

Mr. PRETTYMAN. Your Honor understands that the basis for the rate base in the sliding scale order was perfectly well

known at the time the sliding scale order was adopted in 1935. The company thoroughly understood, and so did the Commission, and so did Peoples Counsel, who was a prime mover in the sliding scale arrangement, that the rate base as then set up was based upon original cost except as to land, and that there was an actual finding of value of the land by the Commission, which value was below the appraised value submitted both by the Commission expert and by the company expert. In other words, that was perfectly well known at the time, and as (496) I recall was fully explained in Mr. Roberts' memorandum in regard to the sliding scale at the time it was adopted. In other words, this question did not develop when the original cost statement was filed with the Federal Power Commission, but was known all of the time——

Chairman HANKIN. That might well be, that our predecessors knew about it, which, of course, does not mean that we should know about it. My own knowledge came through the fact I became interested in the reclassification——

Mr. PRETTYMAN. I do not raise any question as to the rights of the Commission in a proceeding brought for the purpose and with full notice and with full opportunity to prepare evidence, to raise a question as to one of the elements in the sliding scale arrangement. In other words, the question would be should the rate base be limited to original cost, which, of course, would automatically raise the question as to whether the testimony in proof of the rate base not be limited to original cost. That is a separate question from the one——

Chairman HANKIN. You are asking us for an increase in rates under the sliding scale arrangement.

Mr. PRETTYMAN. No. The sliding scale arrangement itself works automatically. We have an agreement with the Commission (497) and we simply come in, together with the Commission's staff, and say the figures under the sliding scale arrangement which has been established by the Commission results in so and so; that is all there is to it.

Chairman HANKIN. You say that under the sliding scale arrangement you are now entitled to an increase in rates?

Mr. PRETTYMAN. No; I say the sliding scale arrangement results in an increase in rates for the next year.

Chairman HANKIN. It would result in an increase in rates if we conceded all of your evidence, but I take it there may well be some question.

Mr. PRETTYMAN. Surely.

Chairman HANKIN. Now, you say that because the Commission started the sliding scale arrangement with a certain item, that thereafter the consideration of that item should be left for a different proceeding?

Mr. PRETTYMAN. Yes; and with adequate notice.

Chairman HANKIN. But that does not seem to be in accordance with the arrangement itself when we consider the statement which I just read to you.

Mr. PRETTYMAN. The statement itself—I do not have in mind what section it is in—but the flexibility in the (498) sliding scale arrangement is specifically provided in Section 6, adjustments——

Chairman HANKIN. No; this is on page 2. This is aside from any particular item.

Mr. PRETTYMAN. I must confess, if your Honor please, I do not see any very serious doubt about the meaning of that section. The sliding scale arrangement is flexible. It has Section 6 which provides for changes as conditions change; furthermore it is flexible in that as costs go up or down, the resulting benefits by way of decrease in rate, or contrariwise an increase in rate, automatically results every year. The sliding scale arrangement in and of itself is a flexible provision and there is not any question at all but that the sliding scale arrangement is susceptible of modification in the basic arrangement. But the point I make is when this Commission issues an order saying you are going to determine the rates and charges pursuant to the sliding scale arrangement, which is the same form of order the Commission has issued every year since the sliding scale was inaugurated, that it cannot under the issues presented by that order proceed to examine into one of the basic elements in the sliding scale arrangement itself. That is an entirely different (499) proposition.

Chairman HANKIN. Has this Commission ever changed the rate of return under the sliding scale arrangement?

Mr. PRETTYMAN. Not in respect to the Gas Company.

Chairman HANKIN. How about in respect to the Electric Company?

Mr. PRETTYMAN. It did.

Chairman HANKIN. Was that made the subject of a separate proceeding?

Mr. PRETTYMAN. Well, I don't know how it came up, whether there was notice the rate of return was going to be considered or not. I am sure I do not know.

Chairman HANKIN. Was this not put in because of that change which was made in the Potomac Electric Rate case under the sliding-scale plan and the question as to the propriety of that change was taken to the courts?

Mr. PRETTYMAN. I think the propriety of the change was taken to the courts. I forget whether that was before or after this sliding scale——

Chairman HANKIN. If the Commission can change the rate of return in considering the rates applicable under the sliding-scale arrangement, why shall it not look into items constituting (500) the rate base?

Mr. PRETTYMAN. I do not say you cannot. You can if the order so provides and notice is given. I do not know what form of order or what form of notice the Commission gave Pepco when they proposed to reduce the rate of return, but I have no doubt the order said that at the hearing they would examine into the rate of return, just as the Commission last March—the notice for this hearing was issued last March—it could have said in the order that you were going to examine into the rate base, but the Commission did not say that. It said they were going to determine rates and charges pursuant to the sliding-scale arrangement.

Chairman HANKIN. In other words, it just comes down to what you said on Friday; it did not give you sufficient time for preparation.

Mr. PRETTYMAN. It makes a much greater difference than that. We think the Commission should go ahead with this proceeding to determine the rates and charges under the slid-

ing scale arrangement and then if the Commission wants to set down a re-examination of the sliding scale arrangement, let it order another hearing, and in the meantime not leave the company hanging as it is, faced with the problem of financing and (501) operation such as this company is faced with; it would leave us totally without any means of making decisions we have to make. We think this proceeding should go ahead under the sliding scale and the Commission then issue its order and proceed to inquire into the sliding scale itself.

Chairman HANKIN. There are lots of things—we should not remain blind to these items—this particular item, for instance, for which you are asking an increase of about $60,000——

Mr. PRETTYMAN. We are not asking for an increase of $60,000 on account of this item; it has been in from the beginning.

Chairman HANKIN. But assuming this item is improper, by how much would that raise your revenue for next year?

Mr. PRETTYMAN. It would reduce revenue by about $65,000.

Chairman HANKIN. Now, before we ordered the rate payers to pay an additional $65,000 under this sliding scale arrangement, we should examine carefully into it.

Mr. PRETTYMAN. But I think it should be an orderly inquiry premises on an order of the Commission and based on the deliberate decision of the Commission it will be re-examined, but not right in the midst of a sliding scale hearing (502) should the company be told the Commission is going to examine into the sliding scale itself. This Commission can consider no more important question with regard to this company than that particular question, and I would like to see if Mr. Stevens has anything to say in regard to it because I am not entirely familiar with the details of the evidence.

Mr. STEVENS. I do not have but very little to add to what Mr. Prettyman has already said, gentlemen, except to point out to you that the sliding scale arrangement was an agreement between the Commission and the company entered into after long negotiations and hearings, at which some ten or eleven thousand pages of oral testimony were taken. Now, that arrangement was believed at the time by the company and the Commission to solve or at least go a long way towards

solving the problem of keeping regulation close behind the actual experience of the company so that when the customers were entitled to rate reductions, they got them promptly rather than await the usual proceeding of a valuation and rate case which sometimes took three or four years. Conversely, it was assumed that when the customers should pay higher rates, they would pay them promptly under that same principle of the sliding scale. (503)

Now, it does seem to us that without going into these questions that Mr. Hankin has raised, that the sliding scale operates both ways. It was always intended to operate both ways. It was an agreement, and under that agreement the company has proceeded to act and carry on its business for seven years and sell its securities. Now, for the first time under the agreement the customers are to pay higher rates if the agreement is to be lived up to by both parties, and it seems to us, I might say, unfair at this time for the Commission to inquire into the fundamentals of the sliding scale, which it has been quite willing to go along over a period of seven years when there have been rate reductions, and the first time there is a step upward, all of the questions that were agreed to in 1935 and lived under for seven years thereafter, are raised, and I would like to point out to the Commission, with all due respect, the company believes that the sliding scale is a two-way agreement; that there are obligations on both sides, and that the welfare of this company, its financial welfare and its financial problem, are inseparably tied up with that of the rate payers, and we——

Chairman HANKIN. I would like to ask a question on the statement you just made. I agree with you thoroughly that (504) a sliding scale arrangement should work both ways, but I question whether your statement that the question I raised presents an unfair situation has any substance.

Let us suppose that throughout all of these years since 1935, the $1,055,000 had no business at all in the rate base. Then, although the rate payers were given reductions under the sliding scale arrangement, would not the conclusion be that the unfairness lay in the fact that they were not getting sufficient reduction?

Mr. STEVENS. May I answer that——

Chairman HANKIN. And now that we are beginning to examine into these items you say that it would be unfair because the rate payer is going to be relieved from paying rates on an inflated base. Where does the question of fairness lie? (505).

V. A. McELFRESH, called as a witness on behalf of the Commission, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (558)

* * *

Mr. HARRISON. That brings us, then, to the fifth issue which relates to the excess profits tax, and the facts as to that issue will be found in Paragraph 5 of the stipulation. (576)

You have eliminated from operating taxes $43,928.02 covering excess profits taxes. Do you recognize this item as an operating tax under the classification of accounts?

Mr. MCELFRESH. Yes; I think it must be so classified. The classification is more specific as to income taxes, but it has generally been allowed as an operating tax, and I see no difference in the excess profits tax, as a tax, from the Federal income tax.

Mr. HARRISON. But you have suspended that item in this case at the present time?

Mr. MCELFRESH. Yes; I have.

Mr. HARRISON. I assume, therefore, it is correct to state that you have done so for the purpose of bringing the matter to the attention of the Commisison to determine whether such charges in the test year should be considered in the determination of rates for the next rate year when it appears from the facts stipulated in this case that the company will not be required to pay excess profits taxes for the year 1942?

Mr. MCELFRESH. Yes; that is the purpose of this adjustment. It was thought that the Commission could consider whether this amount should be eliminated in the determination of rates for the ensuing rate year since it appears that the (577) company will not then be subject to such a task.

Mr. HARRISON. What effect would the allowance of excess profits tax have in the determination of rates under the

sliding scale arrangement if the company should be subject to excess profits taxes in the year 1942 and later years?

Mr. McELFRESH. An increased rate based on consideration of excess profits tax would produce more excess profits and larger excess profits taxes in ensuing years, and would result in pyramiding the excess profits tax on the company at the expense of the consumer, without material benefit to the company. (578)

* * *

Mr. PRETTYMAN. That completes our case, your Honor.

Chairman HANKIN. Mr. Booth, you stated you wanted to make a motion.

Mr. PRETTYMAN. May I say in regard to adjournment of the hearing for the purposes of Mr. Booth's cross examination, (750) we want to point out, if your Honor please, that these rates are supposed to go into effect on September 1st, and this order for the hearing was issued last March, and the date for the hearing was set some time ago, and the normal operation of the sliding scale arrangement has been known here for a long time. This hearing takes place every year, and we would certainly oppose any extended recess or extended postponement. We think this case is complete and that the order should go into effect.

Chairman HANKIN. I have also reserved my questions until after counsel have examined the witnesses.

Mr. PRETTYMAN. I understood that you have some more questions. Also we probably will have some other things to present.

Chairman HANKIN. Don't you want us to be prepared with those questions? After all, your books were not ready until this month, were they?

Mr. PRETTYMAN. That is perfectly true, but I am talking about an extended postponement. What you refer to always happens in the sliding scale arrangement.

Chairman HANKIN. The first opportunity the Commissioners had to look at any of the figures was last Thursday. (751)

Mr. BOOTH. The Commission having granted leave to the Office of Price Administration to intervene and to be a party in this proceeding yesterday, I would like to refer to our peti-

tion wherein we ask that the sliding scale arrangement be re-examined in the light of the Government's program to prevent further increase in the cost of living.

Counsel for the company suggests they are opposed to an extended recess. I do not know what he has in mind by an extended recess. He also suggests that in the normal course of the operation of the sliding-scale arrangement the proposed rates would become effective on September 1st. The fact is that the analysis of the company's operations with respect to the so-called test year were not available until yesterday, when the hearings were begun—let me correct myself; they were available at the pre-hearing conference on Friday.

We think we are entitled to a reasonable opportunity to examine the results of the company's operations during the preceding year so that we may be in a position to present our views as to whether or not the sliding scale arrangement, if carried out without granting the increase which the company suggests, would impose any substantial hardship upon the company. (752)

Now it is true that upon the company's own presentation, namely, that they are earning approximately 5 per cent upon this rate base after the allowance of all their operating expenses, all items of taxes, including Federal income tax and excess profits taxes and including a number of items that have been mentioned either by one of the members of the Commission or some of the members of the Commission's staff, I think upon that showing there is a pretty clear indication that there would be no substantial hardship imposed upon the company if the existing rates were to remain and no increase were to be granted by this Commission.

Nevertheless, we would like a reasonable opportunity to review the facts, to review the basic phases of the sliding scale arrangement so that we might be in a position to demonstrate to the Commission on the basis of a more complete record than is available today, that the results of the company's operations during the preceding year will impose no substantial hardship upon the company if the rates remain where they are and there is no increase in rates.

Now, I am not going to ask for an extended delay. The company the other day suggested that they wanted sixty days to go into some of the facts raised by one of the Commissioners. (753) I am merely suggesting the sixty-day period as an illustration and that sixty days in a rate case is not considered an unusual continuance. I would like a minimum of three or four weeks, and it might be that after we have had an opportunity to review the record that has been presented here during the last two days, which I understand includes records in two other cases, that I could shorten the time. But both for purposes of questioning the witnesses that have been presented and for the purpose of presenting affirmative testimony, I am particularly interested in presenting some general economic testimony on the effect of changing economic conditions upon what is a fair and reasonable rate of return today as compared with whether or not 6½ per cent was a fair rate of return when the sliding-scale arrangement was entered into.

So I think we are not asking for an extended period in asking that the case go over for three or four weeks, and I think the company ought willingly agree the rates they are now charging should remain in effect; it is up to the Commission, anyway.

One of the issues in the case is the question as to whether or not the company should be entitled to higher rates (754) to compensate them for higher Federal income taxes. Our office has had some experience with this problem in connection with utility companies and I would like to refer to that. There is a company which filed an application for higher electric rates before one of the state commissions recently, and it appeared the application was predicated upon a desire to be reimbursed for higher Federal income taxes, in substantial part, and by income tax I am referring both to Federal income tax and excess profits tax. The other day, upon reconsideration of its petition, the company withdrew its request.

In another case the company raised telephone rates in practically the entire state, and it appeared that in that case the higher rates were sought to offset, in substantial part, estimated higher Federal income taxes. We met with the company and the company withdrew the increase requested.

I know in this case there is the question the company is raising, namely, what is fair and equitable and whether it is being treated fairly in view of the sliding scale arrangement which has been operating for several years and which they say has resulted in substantial rate reductions over a period of years, and whether or not they cannot properly increase those rates. That appears to be a rather delicate question. (755)

I think the issues which we have raised, namely, the relationship between the war and the Government's program to stabilize cost of living can be said to overshadow that, especially since the Commission has granted us leave to intervene. So I would like a period of three or four weeks.

Mr. PRETTYMAN. In reply to Mr. Booth, Mr. Chairman, neither one of the reasons which he assigns for an extension of three or four weeks has any part in this proceeding. He says he wants an extended period of time to present testimony and to argue as to why the rate of return and the sliding scale arrangement should not be changed. That is not in issue and no evidence in respect to it has been presented, and it would take a long time to prepare for a case involving the rate of return under the sliding-scale arrangement. If we are going into that proceeding the Commission will have to issue a new order and bring a new proceeding and give everybody time to prepare for the case, which would be a long, complicated, and exceedingly serious case. But that is not involved in this proceeding.

The second reason he gives for seeking the extension is that this increase resulting from the sliding scale is in (756) part a provision for increased income taxes. That is not the case here as was the case in the instances to which he referred. He did not name the case, but if it is the case I know about where there was a request for increased rates, in that case the company came in and said "We think our income taxes are going to be increased next year and the year after and the year after, and therefore we want our rates increased." There is no such thing as that in this case.

* * *

Mr. HARRISON. About the question Mr. Booth says he has testimony to present relating to the economic aspects of the case, I certainly see no reason for deferring this case for that

purpose. I do not see why that could not be presented today. (759)

* * * * *

Chairman HANKIN. Mr. Prettyman, you made your answer to the request of Mr. Booth addressed to the Commission for a period of three or four weeks. How much time do you think I ought to have to prepare for an examination on the questions which I raised?

Mr. PRETTYMAN. For your preparation on the questions that have been raised, I think it would take you only a very short period to get ready; I should think it would be a matter of only a few days.

Chairman HANKIN. Considering I have other duties to attend to here, and after all, when I raised these questions, you said you needed sixty days.

Mr. PRETTYMAN. No. I said if we had to try the reasonableness of every item and all of these expenditures, and if we had to try the land question, we would certainly take a minimum of sixty days to get ready. But when those are not involved—the land question is not involved—if the (762) Commission had insisted that we try the reasonableness of every item here, of course we would have had to ask for time.

Chairman HANKIN. You mean you needed sixty days to cover the reasonableness of every item?

Mr. PRETTYMAN. It would probably take sixty days to put them in the record.

Chairman HANKIN. So the sixty days was not intended to try the reasonableness of every item, but to try the questions which I raised.

Mr. PRETTYMAN. I premised that entirely on the question of what the questions were. My statement at the end of the prehearing conference was that when we had a statement of what the questions were and when we knew what was involved, we would then know how much extension we would have to ask for. When the questions were read at the beginning of the case yesterday and the form was finally determined, we went straight ahead with the case.

Might I also suggest that since the cross-examination of the witnesses would relate to questions which the Chairman himself

asked, the questions certainly came as no surprise and therefore the period necessary for further examination along that line would not be extended. (763).

Chairman HANKIN. They were shots in the dark, because the first time I had any opportunity to get at those figures was last Thursday, and I have not had an opportunity yet to look into any of the records.

Mr. PRETTYMAN. I appreciate that, and I am quite content that a few days be given for everyone to cross-examine along the lines of the testimony today. But when Mr. Booth asked for an extension on two grounds that have nothing whatever to do with the case and says he wants to present evidence which has nothing to do with any of the issues in this case, I see no reason for carrying over the sliding scale beyond the first of September, because any economic evidence relating to the fair rate of return would be immaterial to this proceeding.

Chairman HANKIN. What would you think, Mr. Prettyman, if we said to you "Here are a number of questions we want you to be prepared on and we will allow you only four days in which to prepare yourself?"

Mr. PRETTYMAN. If it took me longer than that I would object if the questions went to some issue in this case. If Mr. Booth said he wanted to produce testimony on the issues in the case, then that might be something else.

Chairman HANKIN. Do you think we can fairly try a case (764) and have a full and complete hearing both on behalf of the Company and the public within a few days?

Mr. PRETTYMAN. Yes; absolutely.

Mr. BOOTH. I will say this, if the Commission please, that if I was limited to the narrow conception of the issues which are in this case and which Mr. Prettyman now says are in the case, he should have objected to my intervening petition, because fundamentally it presents issues other than the narrow conception of the issues in the case which he believes are now involved in this proceeding.

Mr. PRETTYMAN. I stated when I consented to the intervention that I did not concede those various paragraphs in the petition. Maybe I made a mistake in consenting. If I had known that the only thing Mr. Booth wanted to do was to raise

an issue not involved in the case, I might have objected. The proposition that an intervening party can come into the middle of a proceeding when the Commission and the Company are fully familiar with all of the figures involved and all of the points and what not, and nevertheless the intervener can ask the case go along long enough for him to familiarize himself with all of the records of the Company, is out of order.

Chairman HANKIN. No; that would have taken more than six (765) months, would it not, Mr. Prettyman?

Mr. PRETTYMAN. I think probably it would have. The Commission's staff is fully familiar with every figure of the Company and has been all during the year, in the first place, and ever since the books were closed. This Commission of course has had monthly reports of the operations of this Company all through the year. (766).

ROBERT C. OWERS, called as a witness on behalf of the Washinton Gas Light Company, having been previously duly sworn, testified further as follows: (779).

CROSS-EXAMINATION

* * *

Vice-Chairman HANKIN. In 1941 when you had to pay excess profits taxes, it means that you were earning a greater amount than you had earned in previous years, despite the fact that you were making excess profits; is that not so?

Mr. OWERS. The thing comes about because the excess profits are calculated before Federal income taxes and the return to the utility is after income taxes.

Vice-Chairman HANKIN. But you were making more than what one might call a reasonable rate?

Mr. OWERS. Not at all. We were making less, because in calculating the income for excess profits purposes it was calculated before income taxes. Income tax is part of our expense.

Vice-Chairman HANKIN. But despite the fact you were allowed as operating expenses—not as operating expenses—you were allowed all of the income taxes that you claim, you not only made 6½ percent, but something in excess of that.

Mr. OWERS. We did; yes.

Vice-Chairman HANKIN. In 1941 the excess profits tax (872) was computed on the basis of the previous years, and still you had to pay a tax. What I am interested in is this: Is a public utility entitled to any excess profits?

Mr. OWERS. I do not think they have any true excess profits. I do not think they can have any.

Vice-Chairman HANKIN. Let us suppose it is found that by accident you have excess profits; is it in accordance with your judgment that a public utility is entitled to any excess profits?

Mr. OWERS. I think they may well be; yes. I do not think the words "excess profits" should be taken in its literal sense. I think a utility is entitled to a fair return.

Vice-Chairman HANKIN. To a fair return and anything in addition?

Mr. OWERS. Oh, yes; that is to say, I think the fair return may be more than a fixed stipulated return.

Vice-Chairman HANKIN. Do you mean that the utility is entitled to a fair return and anything beyond it that it can get; or what is your idea?

Mr. OWERS. I think the answer to that lies in the type of regulation which is practically here and all over the country. (873).

Vice-Chairman HANKIN. That is true. Let us assume a fair return is 6 per cent. Is a utility entitled to anything more than 6 per cent of the amount invested?

Mr. OWERS. Well, perhaps not over a period of time, but momentarily I think there is no objection to it.

Vice-Chairman HANKIN. We are now exploring your ideas on the subject. If it should turn out according to the figures here that you were making an excess of 6 per cent and if because of that you made excess profits and excess profits tax is imposed on it, should the rate payer be required to pay not only the tax but also the additional amount—should the rate payer be required to pay the amount which enables you to make the excess profit and also the excess profits tax?

Mr. OWERS. Certainly not, the way things are developing now, a very high excess profits tax; I think it would be absurd to set rates for a utility where substantial sums are taken out, and I would not agree to that. My contention is in a utility

operation, closely regulated, that sort of thing can only be a momentary thing.

Vice Chairman HANKIN. Suppose it is momentary; suppose you make them only one year, should the rate payer be required to pay not only a rate which enables you to make excess profit (874) but also pay excess profit taxes?

Mr. OWERS. Well, that is a rather difficult question to answer. Of course, back in 1941 the situation was not as acute, the tax was not as heavy as proposed for 1942. My theory is that the Treasury is undertaking to get revenues from people and corporations in the country, and the excess profits tax is one means of collecting revenues for the United States Treasury. Under the more liberalized method and under the less drastic rates, I should say there was no particular reason why the excess profits tax should not be treated exactly as any other type of tax, but when you come to a rate as high as that under consideration now, I would agree it is not wise practice to raise rates to a point where excess profits taxes would be incurred.

Chairman FLANAGAN. We will take a five minute recess. [Whereupon a short recess was taken.]

Mr. BOOTH. Mr. Owers, coming back to Mr. McElfresh's statement at page 110 of the transcript, do I understand you agree with it in substance?

Mr. OWERS. Yes; I have no disagreement with it.

Mr. BOOTH. So that if, in fact, the result of this rate increase would be to bring the company within the excess-profits (875) brackets, that you would agree that the sliding-scale arrangement might be set aside and a rate increase waived?

Mr. OWERS. By no means. I would not go that far. I think Mr. McElfresh's statement is to the effect that if you grant rate increases to a point where you cause a company to pay excess profits taxes you have a sort of doubling-up effect. My judgment is that the rate increase which these figures indicate will not produce an excess profits tax. So I see no reason for carrying your statement through to say that the sliding scale should be set aside.

Mr. BOOTH. If in fact your judgment happened to be wrong and the rate increase here would result in the payment of an excess profits tax of 90 percent to the Federal Government and

10 percent to the company, you would say that in that case the increase would be of an inflationary character and therefore might be set aside?

Mr. OWERS. If that was true with respect to the bulk of the increase or with respect to the continuing situation, I should not think if it happened to be a momentary situation where a small insignificant excess profits tax was incurred, it would be set aside.

Vice Chairman HANKIN. I do not quite follow you, Mr. (876) Booth. As I understood Mr. McElfresh's statement, I do not see any conflict between that and the sliding scale plan. The sliding scale plan itself provides that allowance may be made for reasonable accrual of taxes. Now, if for any reason an accrual of a tax is not reasonable it is disallowed by the sliding scale arrangement itself and therefore the excess profits tax, or that part of it as stated by Mr. McElfresh, might be eliminated, and if any other tax is not a reasonable tax for rate-making purposes it may well be eliminated under the sliding scale.

Mr. BOOTH. I agree with that. The position I have taken is whatever are reasonable expenses and reasonable taxes, considering legal principles and the economy conditions, should be allowed. I merely want to know if there was any point at which the company would take the position that the rate increase to which they might be mathematically entitled on their basis, without agreeing that the operation of the sliding scale arrangement might be deferred. As I take it Mr. Owers has said subject to the usual qualifications contained in many of the statements—he says yes, if, but, and so and so. I do not think his statement is one I agree with or is binding on the Commission but I merely want to (877) know if there is any point at which the company would say that even though mathematically year after year under the operation of the sliding scale arrangement we could come in before the Commission and say we are entitled to a rate increase again. It is true the bulk of it or 90 percent is going to Federal income tax and therefore that is not good business; it is inflationary and we are going to waive it. I understand Mr. Owers has said yes, but, and I just wanted his statement for whatever it was worth.

Vice-Chairman HANKIN. Mr. Booth, you do not think any kind of rate-making, whether it be under the sliding scale plan or any other plan, can be resolved into a mathematical formula, do you?

Mr. BOOTH. I think that is the very basis of our petition. The company has taken the position in this case that the rates are determinable purely on their construction of the mathematics of the sliding scale arrangement. We have said we have got to give consideration to current economic conditions and the Government program to maintain the cost of living and stabilize prices. I hope we have made that position pretty clear by this time. (878)

* * *

Mr. BOOTH. What was the total gross revenue of the (897) company for the first seven months of 1942 as compared with the first seven months of 1941?

Mr. OWERS. I will have to get the figures from one of my associates. Off the record.

(Discussion off the record.)

Mr. OWERS. Do you want operating revenues, Mr. Booth?

Mr. BOOTH. Yes.

Mr. OWERS. For the seven months, it was $6,721,797.

Mr. BOOTH. What was it for the first seven months of last year?

Mr. OWERS. $6,017,637.

Mr. BOOTH. What was the percentage increase?

Mr. PRETTYMAN. You are talking about gross revenue or net?

Mr. BOOTH. Will you ask the Reporter?

Mr. PRETTYMAN. Do all of these questions relate to gross revenue, Mr. Reporter?

The REPORTER. Yes.

Mr. OWERS. Approximately 11.8 per cent.

Mr. BOOTH. Off the record.

(Discussion off the record.)

Mr. BOOTH. Would you read into the record now, Mr. Owers—(898) this is your annual report to stockholders for 1941, a printed copy?

Mr. OWERS. It is.

Mr. BOOTH. Will you read into the record page 3 under the caption "gas sales affected by mild winter"?

Mr. OWERS. Yes.

"The total amount of gas sold increased more than four percent over 1940, although there was a decrease in the use of gas for house heating due to unseasonably warm weather during the winter months. Variations from normal temperatures have a decided effect upon the use of gas not only for house heating but to a lesser degree for water heating and other domestic purposes.

"In 1940 for the months in which house heating is required, January through April and October through December, the average temperature in Washington was 42.9 degrees and the sales of gas for heating and domestic purposes during those months averaged 49.5 thousand cubic feet per customer. In 1941 the average temperature during the heating season was 46.5 degrees and the sales of gas averaged only 46.7 thousand cubic feet per customer. Although some factors other than the temperature variation may have contributed to the diminished use of gas by the average consumer, there is no doubt that if 1941 had (899) been colder, say at the normal average of 45 degrees during the months in which house heating is required, the gas sales and the earnings of the company would have been larger." (900)

Mr. OWERS. The Chairman has asked if the company would consider some arrangement whereby if a rate increase is granted, the consumers would be protected against increases in rates resulting in liability on the part of the company for excess profits taxes as a result of such rate increases. The company's feeling about the excess profits tax situation is as I tried to express last Friday; we do not feel it is a practical matter to increase rates and put 90 percent of the increase into taxes. Just how an arrangement of this sort could be worked out we do not know, but the company will be glad to endeavor to work out, perhaps with the Commission's staff, some such arrangement.

Of course, the tax law is in process of change and we do not know what the tax law is going to say. We presumably will, before the end of the year, and the company would be entirely

willing to endeavor to work out a plan whereby any part of any increase that may be granted, which in the (948) development of business through the year would appear to result in an excess profits tax, if that should come about. As I say, Mr. Chairman, as to how this might be done would take a little figuring; whether it could be done by some plan of perhaps refund or something of that sort to the customers in the latter part of the year on the basis of liability in the latter part of the year, I do not know. We are getting into a matter of law which we would want to look into and it would take time to develop, but as to the principle, the company would have no objection to it whatever. It would be in conformity with the company's idea of its position in an excess profits tax situation at these high rates. (949)

* * *

Commissioner HANKIN. I would like to state for the record that I am not even in as fortunate a position as Mr. Booth, because I do not understand the Chairman's question, nor do I understand the witness' answer. Apparently, the question is in the form of a proposal which would be without the scope of the sliding scale arrangement. How the Commission can insist that every item of rate base, income and (950) expense, must be within the sliding scale arrangement and at the same time make this sort of a proposition, I cannot understand, unless it would mean that with reference to some things we may digress from the sliding scale arrangement and with reference to other things we may not. I am more concerned in this proceeding with how the application of the sliding scale arrangement in the light of the facts presented to us by the OPA—the sliding scale arrangement in no sense states that all taxes accrued or paid by the Washington Gas Light Company must enter into the rates. The sliding scale arrangement expressly states that only such taxes should be allowed as would constitute a reasonable amount. Now, what constitutes a reasonable amount, of course, depends upon the facts pertaining to the time when those taxes are being paid, and it was brought out in the testimony last Friday that a normal tax within the experience of the company during the sliding scale arrangement was in the neighborhood of 19 to 20 per cent; that in-

creased taxes beginning with 1940 were in the nature of war taxes, and a question is presented to the Commission whether it would be reasonable to allow the company an exemption from war taxes, as if to say that the company should not bear its share of the burden of this war. (951) but that the burden should be shifted to the consumers.

Now, in computing the taxes for 1941 on a normal tax basis, we find that the taxes would not have been, as brought out, in the testimony, some $526,000, but some $306,000, and on that basis it is pertinent for the Commission to consider within the sliding-scale arrangement whether the difference of over $200,000 should go into the computation of the rates for the next year, that, of course, aside from all other questions that have been raisetl, whether it is reasonable under any circumstances to allow the company an excess profits tax, absolving the company from excess profits, when in accordance with proper utility regulation, a utility is not entitled to any excess profits altogether.

Now, the proposition made is this, as I understand it, or perhaps I did not understand it—that a rate increase might be allowed, but some arrangement might be made whereby the excess profits tax attributable to the increase would be either returned to the consumers, or what should be done with it is not specified. It seems to me that is entirely outside of the scope of this proceeding. I would like to add that the figures I cited are subject to verification. Perhaps I do not recall accurately what the figures were as (952) brought out in the record last Friday. (953)

* * *

Mr. PRETTYMAN. "The first question Mr. Booth mentioned was whether or not the sliding scale has worked a hardship on the Company. There is no such issue in this case. No one claims it has. The question whether it did or did not does not seem to be material in any event. No one is contesting the point." (954)

* * *

Chairman FLANAGAN. Then I say there are other conditions which must be taken into consideration, such as those you have outlined, and I have requested the OPA to give the Commission the benefit of its wisdom and investigation along this line.

Mr. BOOTH. Paragraphs 11, 12, and 13 state "Approval of increase in public utility rates because of increased Federal income taxes would be contrary to the intention of Congress, inflationary in character and adversely affect the program and policy of the Office of Price Administration to stabilize prices.

Chairman FLANAGAN. On that one point, as I remember it in the record, I have at least twice requested that you address yourself specifically to that question.

Mr. BOOTH. We propose to do so. I just want it clear, Mr. Chairman, that is now one of the issues in this case. That was Paragraph 11. Paragraph 12 states, "It appears that this is the first time since the United States entered the war the Commission is called upon to make a determination or fix rates under said sliding scale arrangement. The application of the arrangement should be reconsidered in the light (1043) of the Government's program to prevent inflation and stabilize the cost of living."

Chairman FLANAGAN. What is there in that statement which alters my position that the duty of the Commission first is to determine whether this company is entitled to a rate increase or not, and then to take into consideration, before granting any increase, all of these other matters which are before us.

Mr. BOOTH. That is all I want to know, Mr. Chairman, that paragraphs 11, 12 and 13 are issues in this case as a result of the granting of our petition for intervention.

Mr. PRETTYMAN. I do not agree to that.

Mr. BOOTH. If Mr. Prettyman and Mr. Stevens here are right, and, of course, they are wrong and we all know it—I take it from what you have said and in view of the Commission's earlier ruling, that paragraphs 11, 12, and 13 are in fact issues in this proceeding.

Mr. PRETTYMAN: We do not agree to that. Take Paragraph 12. It states that the application of the arrangement should be reconsidered. That means that the continued use of the sliding scale, as I understand that, no longer should be considered. That is not an issue in the case and was not made (1044) an issue in the case by that representation, since there is no request that it be made an issue.

Here is where Mr. Booth differs with us in regard to that point: The sliding scale agreement is in effect now. Under the statute the Commission, of course, retains jurisdiction. There are two methods by which the sliding scale arrangement can be modified or changed, and only two methods. The first method is that the Commission serve notice that they intend to proceed to consider a modification of the sliding scale. That is a perfectly plain issue. Subsequent to that hearing, if the Commission should call such a hearing, the Commission might decide to abrogate the sliding scale. In accordance with the sliding scale agreement it would then give 90 days notice and would have to give 90 days notice of any such intention on the part of the Commission. The only other way it can be modified, changed or suspended is by agreement. The sliding scale arrangement is an agreement between the Commission and the company and a modification can occur by agreement.

Those are the only two ways in which an issue as to whether the application of the sliding scale arrangement should be reconsidered can be raised. Then, if the Commission (1045) sets a hearing and gives 90 days notice under which it would propose to either modify or abrogate the sliding scale, that is the first way, and secondly it can be done by agreement between the Commission and the company. Such an agreement would be changed at any time by agreement of the parties. There is no such situation presented at the present time.

Commissioner HANKIN. In other words, Mr. Prettyman, according to your view, the question of increased taxes can play no part in this hearing held under the sliding scale arrangement; is that correct?

Mr. PRETTYMAN. Well, it depends altogether upon how broad you are making the question. If there was an increase in taxes last year, then these taxes are deductible under the sliding-scale arrangement——

Commissioner HANKIN. That is just it. The position OPA has set forth in its petition for intervention and which has also been indicated by various questions asked, is that in the past few years there have been abnormal taxes imposed, and they, of course, raise the question of the amount of taxes

which should go into the computation of the rates under the sliding-scale arrangement. The position of the OPA (1046) is these abnormal taxes should not be included. So your position is that you would expand the issues and go beyond the sliding-scale arrangement. Is that correct?

Mr. PRETTYMAN. Certainly.

Commissioner HANKIN. Yes. I do not quite understand what the position of the Chairman is on this matter.

Mr. PRETTYMAN. The Chairman asked the question yesterday as to whether or not the company would attempt to work out——

Commissioner HANKIN. I mean on this matter of intervention. Is it the position of the Chairman that this question pertaining to taxes does enter into the application of the sliding-scale arrangement?

Chairman FLANAGAN. I think I have made myself clear in dividing this proceeding into two parts. So far as the sliding-scale arrangement is concerned, the Commission has the duty to figure out, first, whether this company is entitled to a rate increase strictly in accordance with the terms of the sliding-scale arrangement. As to the second part, I have invited Mr. Booth to give us the benefit of his views and the views of OPA with respect to income taxes and with respect to their contention that income taxes should be treated on the (1047) basis of the so-called normal year rather than an abnormal year. To me, that does not affect in the slightest the application of the sliding-scale arrangement. It is a point in which this Commission is interested and on which we would be glad to hear the OPA.

Commissioner HANKIN. On this particular issue I might say I do not see in it an expansion of the sliding scale arrangement because the sliding-scale arrangement itself provides for only a reasonable allowance for taxes.

* * *

V. A. MCELFRESH was recalled as a witness, and having been previously duly (1213) sworn testified further as follows: (1214).

* * *

Mr. BOOTH. Just one other question. Mr. McElfresh, I talked to you briefly over the telephone about the application of depreciation under the sliding scale arrangement.

Mr. MCELFRESH. Yes.

Mr. BOOTH. I think you said that the accrued depreciation, and I think you now say in the record that the accrued depreciation was taken care of by use of the 4 percent. Do you (1224) recall whether you indicated that a truer or more correct consideration of accrued depreciation would be done if the same rate was used for both interest and the rate of return?

Mr. MCELFRESH. Yes. If you were to apply an interest rate of 6½ per cent to the reserve balance, the net result would be exactly the same as if you had deducted accrued depreciation from the rate base.

Mr. BOOTH. If you had used 6½ per cent the result would be to deduct the depreciation reserve from the rate base?

Mr. MCELFRESH. That is right.

Mr. BOOTH. And that would be a more correct consideration of accrued depreciation than is now given to the subject by the use of the 4 per cent?

Mr. PRETTYMAN. I object to that question.

Mr. STEVENS. I object to that.

Mr. PRETTYMAN. Do you mean more correct under the sliding scale or more correct something else?

Mr. BOOTH. More correct as to the consumers; let me put it that way.

Mr. PRETTYMAN. That is a general question and I do not know how he can answer that question.

Commissioner HANKIN. Let me ask you this question, Mr. (1225) Booth: Do you mean by that, does not this method amount to allowing the company a 2½ percent return on property which is no longer in existence; is that what you mean?

Mr. BOOTH. That is one thing. I think Mr. McElfresh understands it, and I think he can explain it, and I think it is relevant in this case, because we are considering the broad question of hardship. That is the basis for the OPA's position. If the company is getting the benefit, of course, of an improper or inadequate deduction of accrued depreciation——

Chairman FLANAGAN. Are you not getting into the realm which I have indicated was beyond the scope of this hearing, Mr. Booth?

Mr. BOOTH. I do not think so.

Mr. PRETTYMAN. That is the point I have in mind, Mr. Chairman, how the retirement reserve should be computed and the rate of interest which shall be deducted, etc.; those figures are integral basic parts of the sliding-scale arrangement. If Mr. Booth wants to raise the question as to whether the sliding scale ought to be abrogated and some other method of accounting adopted that is to say, we go into the field of depreciation instead of retirement accrual account as provided in the sliding scale, that comes up in some other (1226) hearing where that issue is raised, but it is not an issue in this case.

Mr. HARRISON. The question raised by Mr. Booth is a complete departure from the sliding-scale plan. Mr. McElfresh when he first came on the stand and presented the exhibit No. 1, stated it was prepared in accordance with the sliding-scale plan.

Chairman FLANAGAN. The objection to the question is sustained.

Mr. BOOTH. I understood, but perhaps I misunderstood, that OPA would be given an opportunity to develop pertinent facts for the purpose of determining whether or not a rate increase was necessary in order to prevent a hardship, and in that connection it certainly is necessary to give consideration to the question whether or not under the methods now used in prescribing the rates, it operates as a hardship to the customers as against a hardship to the company. If the company is getting the benefit of a return predicated upon an undepreciated rate base, of course it is clear that that works very, very much in favor of the company and it imposes an undue, and in my judgment an illegal burden upon the rate payers. (1227)

Chairman FLANAGAN. I think, Mr. Booth, we have made clear exactly what we want from OPA. Unfortunately I do not think you are making any attempt to give us the benefit of what I have requested. That type of testimony is ruled out.

Mr. BOOTH. If the Chairman please, the position of OPA is expressed in its intervening petition. We were allowed to intervene and be made a party to this proceeding——

Chairman FLANAGAN. That is right.

Mr. BOOTH. Has there been a change of mind on the part of the Commission as to whether or not we are now allowed to intervene and be a party to this proceeding?

Chairman FLANAGAN. Not in the least, but we have announced from the bench how and in what respects we want the advice of OPA.

Mr. BOOTH. That is, you are now attempting——

Chairman FLANAGAN. The time you are taking up arguing as to the legal position of OPA might well be better devoted to developing some of the ideas of the OPA which will help us.

Mr. BOOTH. Mr. Chairman, it may be that the question of the legal position of OPA is a very important matter from the viewpoint of OPA in connection with this record and the (1228) protection of its rights in this proceeding——

Commissioner HANKIN. Mr. Booth, may I ask you——

Mr. BOOTH. If we have been misled by the authority granted by the Commission on August 18th permitting us to intervene and whether or not the issues we raised in this proceeding are legal issues in this proceeding, of course that is a thing I have been trying to have cleared up and it has not been cleared up to my satisfaction.

Chairman FLANAGAN. I do not think you have been misled. I think it has been very clearly stated.

Commissioner HANKIN. I cannot understand the significance of your question, Mr. Booth. You are trying to analyze the operation of the provisions with reference to depreciation under the sliding scale arrangement; is that it?

Mr. BOOTH. Correct, in the light of what is the law on the subject today.

Chairman FLANAGAN. Mr. Booth, do you contend that the calculation has not been made in accordance with the terms of the sliding scale arrangement?

Mr. BOOTH. Has the calculation been made in accordance with the terms of the sliding scale arrangement?

Chairman FLANAGAN. Yes. (1229)

Mr. BOOTH. I suppose as a matter of mathematics the calculation may be right; but I do not believe that when Mr. McElfresh makes a calculation that that automatically divests

the Commission of its legal jurisdiction and its legal duty to find rates that are fair and reasonable to the customers as well as the company in the light of what is the law on the subject today.

Chairman FLANAGAN. I think we have discussed that several times and I think the position of the majority of the Commission is as clear as I can give it.

Commissioner HANKIN. What is your ruling?

Chairman FLANAGAN. That question I have ruled out.

Commissioner HANKIN. I would like to dissent from that ruling on this ground: As I take it, neither the OPA nor anybody else raised the question that the excess allowance under the sliding-scale arrangement for depreciation over and above actual depreciation should be eliminated from the computation of the rate under the sliding scale arrangement. In other words, as has been partly brought out by the testimony, the company is given a return of a 6½ per cent on its rate base, undepreciated rate base. The deduction under the sliding scale arrangement in effect is 4 per cent of the reserve for depreciation (1230); is that correct?

MR. MCELFRESH. Yes.

Commissioner HANKIN. In other words, under the sliding-scale arrangement, what this actually amounts to is that in addition to being allowed 6½ per cent on the actual rate base, the company is allowed 2½ per cent on property which no longer exists, which is depreciated, or on the depreciated part of the rate base.

Now, we need not at this time consider whether the allowance for return should eliminate this 2½ percent, but it certainly becomes a very pertinent question in this case when the company itself states that it is in a desperate position, that it would be unfair, and so forth and so forth and so forth, to consider whether the company should be disallowed an increase upon the computation that is already made. It seems to me that the entire question of fairness that has been raised by the company has no bearing in the case where in addition to being allowed 6½ per cent return on its actual rate base it is allowed 2½ per cent on property which no longer exists.

Chairman FLANAGAN. Of course, if the Commissioner insists

on getting into the record views which the majority rules out, we cannot stop it except by instruction to strike, and in this (1231) case I will not do so. * * *

* * *

Commissioner HANKIN. It certainly is not appropriate when it goes to the question that is raised necessarily in this case. I have raised this question on a previous occasion in another hearing pertaining to another utility.

Chairman FLANAGAN. Will you proceed, Mr. Booth?

Mr. BOOTH. Mr. McElfresh, you indicated earlier in your testimony that the operation of the 4 per cent is intended to provide for accrued depreciation. You do not by that statement mean to imply that it correctly takes care of accrued depreciation in this property in the determination of rates except that it apply—the 4 per cent is merely the proper mathematical calculation under the sliding scale arrangement?

Mr. STEVENS. I object to the question.

Mr. BOOTH. I suggest that I be permitted to go on with the questioning, Mr. Chairman.

Mr. STEVENS. That kind of question leads to the inference (1232) that Mr. McElfresh, if he says yes, disapproved this arrangement.

Mr. BOOTH. He told me he did not believe it correctly applies for accrued depreciation.

Mr. STEVENS. I object.

Chairman FLANAGAN. The objection is sustained. If the questions are confined to the proper calculation made under the sliding-scale arrangement which has been in effect for years, then there is no reason to object to it.

Mr. BOOTH. Mr. Chairman, the reason was explained for the 4 per cent, that it takes care of accrued depreciation. I do not know whether it was intended to give the company a bonus by failure to deduct accrued depreciation, but I do not think it is fair to have the witness leave the record in the state of having it appear that the 4 per cent interest properly and adequately takes care of accrued depreciation, and that is the inference which is to be drawn from the status of the record at this time—just a moment, Mr. Stevens.

Mr. STEVENS. I am just getting up.

Mr. BOOTH. I have discussed this matter with Mr. McElfresh off the record in order to explain it, and as I (1233) recall he stated that a more accurate or an accurate determination of the accrued depreciation would be to have applied an interest rate of 6½ per cent. I think that is what he indicated. Now, I may be wrong about it, but I think it would be most unfortunate to have the record show that the witness stated that the 4 percent takes care of accrued depreciation.

Chairman FLANAGAN. I do not think the witness has made any such statement. He has testified to his calculation under the sliding-scale arrangement.

Mr. STEVENS. I suggest it is obviously improper after the Chairman has ruled on a motion that counsel for any party go on and explain why the Chairman is wrong or why he thinks he is wrong. I ask that the statement of Mr. Booth be stricken from the record.

Mr. BOOTH. I strenuously except to Mr. Stevens' remarks, and I do not think Mr. Stevens ought to continue to imply that I ought to try this case according to the method which Mr. Stevens thinks will develop the best record in order to help his company get a rate increase. That is not my theory of trying a rate case.

Chairman FLANAGAN. Let us proceed. (1234)

Mr. BOOTH. I understand that the Chairman has ruled out further questioning of this witness in connection with the determination of annual and accrued depreciation under the sliding scale?

Chairman FLANAGAN. Your understanding is not correct, Mr. Booth. So long as the questions pertain to Mr. McElfresh's activities as chief accountant under the sliding-scale arrangement, your questions may be perfectly proper.

Mr. BOOTH. Mr. McElfresh, as I understand it, the sole function which you performed in the preparation of this exhibit with respect to depreciation was to make a mathematical calculation?

Mr. MCELFRESH. Depreciation in a sliding-scale rate case is determined in accordance with the provisions of——

Mr. BOOTH. That is all you did?

Mr. MCELFRESH. Yes; that is all I did.

Mr. BOOTH. You are not saying it is correct?

Mr. MCELFRESH. I am saying it is correct in accordance with the sliding-scale agreement.

Mr. BOOTH. But you are not saying that the application of it is fair and equitable?

Mr. STEVENS. I object. (1235)

Chairman FLANAGAN. Mr. Booth, why do you continue that line of questioning to attempt to get into the record some opinion which you know has no relevance to the sliding scale? When this Commission decides to open the case on the sliding-scale arrangement it will give appropriate notice and conduct that investigation as a separate problem.

Mr. BOOTH. Will it indicate whether it has any intention of doing so?

Chairman FLANAGAN. It will not indicate one way or the other at this time.

Mr. BOOTH. That is all at this time. (1236)

* * *

(1276) LETTER TO HON. GEORGE W. NORRIS FROM LEON HENDERSON

Honorable GEORGE W. NORRIS,
United States Senate,
Washington.

DEAR SENATOR NORRIS: I was greatly interested in your letter of August 11 on the problem of utility rates and the program of this office and the National Government to stabilize commodity prices and the cost of living. The problem has been given special attention by this office in recent weeks and I shall be happy to supply you with information about our activities in that field and "to aid you in ascertaining to what extent applications for such increases are coming in from over the country generally and, if they are coming in, what we are doing about the matter, and what we are able to do to prevent such increases."

As you know, the Emergency Price Control Act exempts utilities and common carriers rates and we are without power to fix such rates and charges. Nevertheless, we have deemed it necessary to participate in rate regulatory proceedings in

our effort, not altogether unsuccessful thus far, to prevent increases in conflict with our basic program.

Let me refer briefly to some of the specific cases and problems we have recently encountered in this field. In April our attention was called to the 15% increase in telephone rates made by the Northwestern Bell Telephone Company in the State of Ohio. This increase, termed a surcharge by the company, was imposed on nearly all exchange and intrastate toll service. No regulatory agency whose permission must be first obtained for such rate increase in Iowa is provided for by the laws of that state. After obtaining the technical assistance of the Federal Communications Commission, we called the company in conference and requested it to withdraw this increase, as it appeared that the higher rates were imposed in large part to offset estimated higher Federal income taxes. The company agreed to this request and subsequently withdrew a request for a rate increase of about the same character pending before the North Dakota Commission, although it had earlier obtained the approval of the South Dakota Commission for a similar increase in rates.

We are attempting to keep a close watch over other telephone rate increase applications in various parts of the country. The American Telephone and Telegraph Company has furnished us with a list of all such applications which have been made by its associated companies. I am glad to say that there are now relatively few such applications pending.

A somewhat more difficult problem with respect to telephone rates is presented in connection with the rates charged by the independent telephone companies because of their large number. We recently met with the Executive Committee of the United States Independent Telephone Association and explained our program to them. To the extent of our ability, we propose to scrutinize their requests for increases and participate in as many cases as possible.

Because of your lifelong effort to protect the public in their relations with the electric light and power industry, you may be especially interested in our work in the electric rate field. It is true, as you suggest, we filed a petition for intervention in the Bangor Hydro-Electric rate case before the Maine Public

Utility Commission. There, too, it appeared that the increase requested was because of projected higher Federal income taxes. Moreover, we were advised by certain paper companies, customers of the electric company, that if the power rate increase was approved, they would seek to have our maximum prices on paper and pulp increased. While conferences were pending with respect to the date of hearing, the company withdrew its application for an increase.

At the request of the Rural Electrification Administration, we participated in conferences with respect to a proposed increase in rates for electric energy sold by an electric company to a rural cooperative. Subsequently, the company withdrew its request for higher rates.

Among other power rate cases now receiving our attention is The Niagara Falls Power Company case before the New York Public Service Commission. In another, the Pennsylvania Power and Light Company is seeking increases before the Pennsylvania Public Utilities Commission applicable to its commercial and industrial customers. We will probably seek to intervene in this case also.

Our survey of pending electric rate cases does not now indicate a large number of applications for rate increases. However, there is now an upward trend in the number of requests for rate increases before the state commissions, which seems to be due primarily to efforts to shift war taxes upon the utilities to their consumers.

The gas rate problem appears to be more troublesome at this time. Among the cities where increases have recently been made or now pending are Boston, Philadelphia, Cleveland, Minneapolis, and Washington, D. C. We are now or will oppose most of these increases, particularly because they adversely affect the cost of living of practically the entire populations of those cities.

The relationship of taxes to utility rates is extremely important in devising and administering a proper program to control prices and the cost of living. In peacetime the principle that a utility is entitled to a fair return after allowance of all Federal income tax has been generally accepted. As an essential war measure, however, we propose to oppose the applica-

tion of this principle to any request which would contemplate an increase in rates predicated upon the allowance of anything over and above the normal Federal income tax. Higher rates predicated upon increased Federal taxes would obviously be contrary to the intention of Congress, be inflationary in character, and adversely affect our program to prevent further increases in the cost of living.

In our work in this field we have sought to cooperate with the existing regulatory agencies. Both the Federal Power and the Communications Commissions have gladly made available the advice and help of their technical experts.

I am glad to state that our right to intervene and participate seems to be readily conceded in these cases before the Federal and State utility commissions. However, one Commission, that in the State of Illinois, has not yet acted upon our request for intervention. This is a proceeding involving streetcar fares in the City of Chicago. Of course, we have no desire to interfere with the efforts of the State or Federal Commissions under their respective statutes to reduce rates whenever found necessary.

In seeking to cooperate with the existing regulatory agencies in the utility and railroad rate fields, we are proceeding in the belief that when Congress exempted these rates from our jurisdiction it was implied that these Commissions would recognize that the dominant principle governing the fixing of all prices in wartime would be the Government's program to stabilize commodity prices and the cost of living and that the utility and railroad rate principles must be reexamined in the light of the Government's economic program, the success of which depends both the winning of the war and the peace. Their recognition of this obligation will be an important step in the success of the Government's program to prevent further increases in the cost of living.

Therefore, while I hope that there will be no need for additional legislation in this field, serious consideration must be given to the practice in Canada where the consent of the Price Board, which administers an over-all program, as well as that of the existing regulatory authorities is a prerequisite to utility rate increases. Certainly, it should be understood without ad-

ditional legislation that Federal income taxes shall be borne by those upon whom such taxes should be levied. A different policy would seriously impair, if not destroy, the basic efforts of the Government to stop inflation.

We appreciate very much your interest in this phase of our work. If we can furnish you with any additional data or information on it, please do not hesitate to call upon us.

Sincerely yours,

LEON HENDERSON,
Administrator.

* * *

Mr. BOOTH. I move the admission of Exhibits 6 and 8.

Mr. STEVENS. I object to the admission of the paper which has been marked for identification as Exhibit 8 on the (1309) ground that the figures with respect to depreciation are erroneous and that the result must of necessity fall with any infirmity of the elements from which the result is derived. I also object to this document on the ground that the Federal income taxes computed by this witness are entirely outside of the formula stipulated in the sliding scale, and again the result of this paper would be incorrect as being based on an infirm foundation.

Mr. BOOTH. I say that under Section 18 of the Public Utilities Act and other provisions of the Public Utilities Act, the Commission is under legal duty to receive this exhibit in its entirety, and what we have done is to prepare an exhibit here predicated upon the lawful way of treating both depreciation and income taxes for the purposes of determining fair and reasonable rates. We have made no adjustments in other operating costs other than those made by the Commission's accountants which have been accepted, but we have asked the Commission to throw the case wide open so that the Commission may be in a position to consider all relevant factors determining the right of the company to a rate increase so that we can follow the Public Utilities Act under which it operates in fixing rates. (1310)

I take it that the Commission has indicated that it proposes to take that motion of mine which I made earlier today under advisement. It might very well be helpful to the Com-

mission in the consideration of the motions which I made to have before it this exhibit in evidence.

Chairman FLANAGAN. Exhibit No. 6 is admitted. Exhibit No. 8 is in direct variance with the calculation called for under the sliding-scale arrangement. The method of calculating depreciation is no more correct than a calculation under the direct method would be. For those reasons Exhibit No. 8 is not admitted.

(The exhibit referred to was received in evidence as Exhibit No. 6.)

Mr. BOOTH. Do I understand the Commission has also ruled it will not receive this exhibit with respect to our determination of income taxes for the purposes of this proceeding—by excluding this exhibit?

Chairman FLANAGAN. The exhibit is excluded in its entirety. (1311)

* * *

Commissioner HANKIN. I think the Chairman correctly stated that is the ruling of the majority of the Commission. I cannot agree with the ruling excluding Exhibit 8 from the testimony. The Commission in effect says to the OPA, "You can hang your clothes on a hickory limb, but don't go near the water; you may present evidence concerning the effect of increased taxes, of wartime conditions, and so forth, but do not put that down in the form of an exhibit which would show that the company is entitled to a decrease in rates rather than an increase in rates"; I cannot agree with that sort of ruling. (1319).

* * *

Mr. STEVENS. At this time in response to the suggestion of the Chairman and his instructions to the staff of the Commission, the staff of the Commission and the staff of the company have collaborated in preparing a form which is submitted to the Commission herewith, dealing with the excess-profits tax question. That form has been in the hands of Mr. Booth and Mr. Joseph for several days and we would be very glad, the company would be very glad, if there are any questions with respect to it, to have one of the officials of the company answer those questions.

I am sure that the Commission also will be glad to have Mr. McElfresh answer any questions. I have personally thought it is entirely clear and needs no explanation, but that is my own personal opinion, and of course is entitled to no (1337) weight at this time. I would like to offer this paper for the consideration of the Commission, and as I say again, if there are any questions the Commission has or any other counsel have with respect to it we will be glad to put a witness on the stand to answer those questions.

Commissioner HANKIN. I have one question. I do not know what that document is. I have heard numerous references to it. I would like to know why it has been kept secret from one of the Commissioners and not from the others; just what is in it that it is such a secret?

Mr. STEVENS. Nothing at all. You were here at the time the suggestion was made by the Chairman.

Commissioner HANKIN. Yes.

Mr. STEVENS. As far as I know there has been no secrecy or anything like secrecy in the matter and I will clear up any suspicion of secrecy you may have.

Commissioner HANKIN. I wish you would; I don't understand.

Mr. STEVENS. I will do that by handing you a copy of these two paragraphs at this time.

Mr. BOOTH. There are three paragraphs in the copy I have.

Chairman FLANAGAN. Mr. Stevens, as to secrecy, we are (1338) all on an even footing. None of the Commissioners has seen a draft of that document as far as I know. Would you mind having a witness explain simply just what is intended to be accomplished by that document, please?

Mr. STEVENS. The intention, simply, may it please the Commission, is to provide a method by which any increase in rates which may be ordered by this Commission which otherwise would be subject to excess profits taxes may be returned to the customers so that there will be no excess-profits taxes with respect to any increase and that if there otherwise would be a second increase, those payments will be refunded to the customers. I submit that for the consideration of the Commission.

Mr. BOOTH. Do you have someone who could testify on it on the witness stand?

Mr. STEVENS. I would be glad to ask Mr. Ritenour who collaborated with Mr. McElfresh in preparing this tentative suggestion to answer your questions.

Mr. BOOTH. You say it is tentative; when do you expect it to be changed?

Mr. STEVENS. The only body that can change it, as I understand it, will be the Commission; neither you nor I, (1339) Mr. Booth, can supersede the prerogatives of the Commission.

Mr. BOOTH. I do not suggest that.

Mr. STEVENS. We are submitting it to the Commission for its consideration as a possible part of any order that the Commission might make in this case (1340).

* * *

Mr. STEVENS. May I say that one thing I want and that the company wants above all things in this case is to have the Commission be informed as to all of the facts that are pertinent, no matter how slight or minor, in this proceeding, so that it will have all of the necessary information, and with that in mind Mr. Prettyman and I feel that if the Commission would prefer, we would be willing to have exhibit 8 go into the record for whatever weight it may have, the (1340) arguments having been made with respect to it being so clear and the issue being so clear, I believe there cannot be any misconception or misleading of the Commission because that exhibit might be in the record. So if you have no objection, Mr. Harrison or Mr. Booth, we are willing to have the exhibit in, subject, of course to our contentions with respect to its weight and to our statements with respect to the infirmities of certain of the figures used therein.

Mr. HARRISON. I have no objection to its receipt subject to whatever value it may have to the Commission.

Mr. BOOTH. I assume the Commission has ruled on it. Of course, the Commission is free to reconsider its ruling at any time, I believe. If the Commission desires to reconsider its ruling and admit it, that is its privilege and we would like to be advised, of course, if the Commission desires to reconsider its ruling.

Commissioner HANKIN. Mr. Stevens, do you admit that your strenuous objection to that exhibit was erroneous?

Mr. STEVENS. I do not.

Commissioner HANKIN. Then why do you want that exhibit admitted?

Mr. STEVENS. I renew all of my objections to it, but (1341) I do feel, Mr. Hankin, an administrative proceeding is perhaps different from a strictly judicial proceeding, and we do not want to keep from the Commission anything that bears directly on the computation of the sliding scale.

Commissioner HANKIN. Mr. Stevens, do you mean to tell me that that exhibit would not be admissible in court under the rules of civil procedure or under rules of evidence applied in equity cases?

Mr. STEVENS. I do.

Commissioner HANKIN. I beg to differ with you, let alone in an administrative proceeding. That is why I was so amazed such a ruling should have been made on the admissibility of this exhibit.

Chairman FLANAGAN. In view of the statement of counsel for the company and counsel for the Commission, the Commission will reconsider and admit Exhibit 8 in evidence. (1342)

* * * *

Mr. PRETTYMAN. We will be glad to have Mr. Ritenour answer any questions anybody has to ask.

Chairman FLANAGAN. Mr. Ritenour, will you take the stand?

O. H. RITENOUR was recalled as a witness and testified further as follows:

FURTHER CROSS-EXAMINATION

Mr. BOOTH. Since the hour is growing late, Mr. Chairman, I suggest the witness merely hand this paper to the reporter and have it copied in the record, and that will save the time of reading it.

Chairman FLANAGAN. Very well.

(The statement referred to is as follows:) (1359)

"For the purpose of preventing the inflationary effect of increased rates, in the event such increased rates would result in

the payment of excess profits taxes by the Washington Gas Light Company, any portion of the amount derived from the increased rates hereinafter authorized, which, if retained by the Company would be subject to excess-profits tax, shall be recorded in a specially provided deferred credit account. The amount derived from increased rates shall be deemed to be —% of the amount billed for sales of gas subsequent to the effective date of this order. The above stated percent is the ratio of the increase authorized herein to the total sales of gas for the test year ended June 30, 1942, calculated at the rates hereinafter authorized.

The amount recorded in the deferred credit account as of December 31, 1942, and as of December 31st of each year thereafter so long as this order shall remain in effect, shall be returned to the gas customers in the District of Columbia by appropriate deductions from gas bills rendered to such customers as soon after December 31st as practicable. The amount of individual refunds shall be determined by ascertaining, by classes of service, the relation of the amount refundable to the total amount billed during the month of December and (1360) applying such percentage to each customer's December bill. Refunds so determined shall be shown as credits on customers' bills as soon after December 31st as practicable. In the event the amount recorded in the deferred credit account as of December 31st is less than $10,000, such amount shall be treated as operating revenue."

Mr. BOOTH. Are you giving it an exhibit number?

Mr. STEVENS. No; we are offering it at the request of the Chairman.

Mr. BOOTH. You are going to explain it?

Mr. STEVENS. It needs no explanation, unless a person cannot read the language. If you have any questions with respect to it, Mr. Ritenour will be glad to answer them, or if Mr. Harrison has any questions.

Mr. BOOTH. I have a few questions. I will be glad to defer those until someone else asks the witness about it, but I would like to ask a few questions at this time if it is agreeable to the Commission.

Chairman FLANAGAN. You and Mr. Joseph have studied this over the week end and you must have some questions. Don't be so facetious.

Mr. BOOTH. I said I have some. (1361)

Chairman FLANAGAN. Please proceed with them.

Mr. BOOTH. Mr. Ritenour, you participated in the drafting of this statement?

Mr. RITENOUR. I did.

Mr. BOOTH. What do you understand the purpose of it to be?

Mr. RITENOUR. The purpose of the work we did was to prepare an outline of a plan which would protect the gas customers in the District of Columbia against the possibility of excess-profits taxes. The work was done in response to the request of the Commission that the Commission's staff and the company's staff get together and prepare such a plan. (1362)

* * *

Chairman FLANAGAN. The Commission has before it the petition for the reopening of the proceeding filed by the Office of Price Administration. Do you have any statement you wish to make in connection with this petition, Mr. Booth?

Mr. BOOTH. Do I understand the Commission is about to rule on this?

Chairman FLANAGAN. That is right.

Mr. BOOTH. Has it reached a decision on it?

Chairman FLANAGAN. I am asking the questions. Do you want to make a statement with respect to this petition or not?

Mr. BOOTH. I would like to say this, if the Chairman please, that this motion for reopening must be read in the light of the decisions which we have referred to in our brief and in the light of the legal principle that the Commission's function under the law is to fix fair and reasonable rates; that while it may have been possible in 1935 to have complied with its responsibilities and duties under the Public Utilities Act to fix fair and reasonable rates by resorting to a formula entered into in 1935 which may have (1420) been predicated at that time upon the economic conditions and the legal principles which governed the determination of fair and reasonable rates in 1935 and

thereafter as long as there had been no change in the economic conditions, but the Commission cannot now, in 1942, when there has been, as the Commission well knows, such a drastic and complete change in the economic problems and in our economic structure from what they were in 1935, the Commission can no longer fulfill its legal obligations under the Act to fix any reasonable rates without granting the motion which we have filed with this Commission seeking a reopening.

Now, it is true that the Commission did allow the Office of Price Administration to intervene in this proceeding, and we take it that the Commission granted the Office of Price Administration the right to intervene and become a party even though at no time did we have a formal order from the Commission with respect to our own petition for intervention, but I think that the state of the record is such, in view of the many qualifications which the Chairman and majority of the Commission have made with respect to the issues and the legal issues which the company has notice are involved in the proceeding, that the Commission cannot on the basis of the (1421) record before it find that any rates would be fair and reasonable other than the rates which the company now charges and are on file with this Commission.

So it is our position that notwithstanding the fact that there has been some evidence introduced by the Office of Price Administration and some questions asked by the Chairman and by one of the other Commissioners, and miscellaneous evidence introduced on various factual questions in the case, that our position is purely and simply a legal one; that under the Atchison case, to which we have referred and in which the Supreme Court of the United States set aside an order of the Interstate Commerce Commission because that Commission failed to reopen a rate proceeding in view of the changed economic conditions which were brought about as a result of the depression of 1931 and thereafter, so here the Commission would be legally powerless to find any rates that are fair and reasonable rates under the statute without granting the motion which we have filed or entering an order on its own motion of a substantially similar character.

* * *

Mr. STEVENS. I do not think we have anything to say, if it please the Commission. This matter has been argued many times throughout the course of these hearings and the Commission is thoroughly familiar with the principles involved. As Mr. Hankin has pointed out, the reference to the Atchison case as an authority here is an improper one; that is, the Atchison case does not stand on the principle Mr. Booth indicates. It is clear, I think, on this record, that the Commission's hearings have been on the sliding-scale arrangement and it seems to me that anything further that company counsel might say on that subject would be merely adding to what has been said time and time again, not only by the Commission but by counsel throughout this hearing.

If there are any specific questions you would like to ask, we will be very glad to answer them.

Chairman FLANAGAN. I have no questions.

Commissioner HANKIN. Do you say the hearing in this case proceeded entirely upon the sliding scale arrangement?

Mr. STEVENS. Yes.

Commissioner HANKIN. Has it not gotten beyond the (1426) sliding scale arrangement when you witdrew your objection to the admissibility of Exhibit No. 8 presented by OPA?

Mr. STEVENS. I don't recall what Exhibit 8 was, Mr. Hankin.

Commissioner HANKIN. It was a tabulation showing the company was not entitled to any increase but that there were excessive earnings to the amount of something like $45,000.

Mr. STEVENS. Mr. Hankin, I think it was made clear at the time that the reason company counsel did not press their objection to Exhibit 8 was because the exhibit was so patently incorrect on its face that the Commission itself, without further argument by counsel, could determine the obvious impropriety of that exhibit and consequently we felt that in order not further to delay the proceedings we would merely raise the question, which the Commission I am sure is fully aware of, with respect to the weight of the exhibits itself. We had no thought of going outside of the hearings, of course.

Commissioner HANKIN. If the substance of that exhibit was pertinent evidence, what assurance did you have that the Com-

mission, upon considering that evidence, would find it to be erroneous? (1427)

Mr. STEVENS. I think it is erroneous on its face, and we pointed out the errors to the Commission on the record. I think the very reading of the exhibit itself shows that. The Commission has been so advised, not only by counsel for the company but by its own staff.

Commissioner HANKIN. You seem to be very certain of what we might decide.

Mr. STEVENS. I am just thinking you and your associates are experienced members of a regulating commission and that you will consider any element of evidence to have such weight as you in your discretion decide to attribute to it. We pointed out, as I say, its obvious errors. (1428)

* * *

Chairman FLANAGAN. The ruling stands.

Is there any other statement to be made before the Commission announces its ruling with respect to the petition for reopening? If none, the majority of the Commission, the majority meaning General Kutz and I, rule that the petition for reopening the proceeding attached to the letter of the Office of Price Administration dated September 26, 1942, and received in the Office of this Commission on September 28, 1942, is denied.

Mr. BOOTH. May the record show our exception to the Commission's ruling?

Chairman FLANAGAN. Exception may be noted. (1434)

Commissioner HANKIN. I dissent from the ruling of the Commission for the reason that in my judgment no rate hearing can leave out of consideration all pertinent facts which go into the computation of rates. The fact that in this proceeding the Commission is guided by a sliding-scale plan in no way diminishes the Commission's duty to establish just and reasonable rates based on all elements of rate making. To proceed otherwise means to deny a full and fair hearing, either to the company or to the public; in this case it is a denial of a fair and full hearing to the public. (1435)

* * *

Mr. BOOTH. There was one other document that was requested this morning from our office, and that was the letter of the Honorable James F. Byrnes, Director of the Office of Economic Stabilization, dealing specifically with this proceeding. I have a copy which I understand to be an exact copy of the copy which is on file with the secretary of the Office of Price Administrator. (1529)

* * *

Mr. HARRISON. I am reading from the copy handed me by Mr. Booth, which he states is a copy of the original, dated October 15, 1942. The caption is:

"EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF EMERGENCY MANAGEMENT
OFFICE OF ECONOMIC STABILIZATION"

and in the upper left-hand corner, "James F. Byrnes, Director," dated Washington, D. C., October 15, 1942, and the letter reads as follows:

"DEAR LEON. The press of yesterday carried an account of the order of the Public Utility Commission of the District of Columbia entered October 13, 1942, authorizing certain increases in the gas rates to be charged consumers living in the District of Columbia. Prior to the entry of such order there had been enacted the Act of October 2, 1942, which, among other things, provides

"'* * * that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first (1530) gives thirty days' notice to the President or such agency as he may designate and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.'

"On October 14, I delegated to you the authority under the terms of the quoted provisions of the Act of October 2, 1942, which was intended so far as possible and within the limitation of fairness to prevent any increases in utility rates affecting the cost of living.

"It came to me as a surprise that such action on gas rates in the District should be taken so soon after the enactment of the

emergency legislation to stabilize the cost of living and the issuance of the President's executive order thereunder, without deliberate consideration of the effects of such action on national policy and the conformity of such action with the letter and the spirit of the law.

"I would suggest that you take such action as is within your power to have the increase stayed and the case reopened for a more adequate consideration of the effect of the increase on the national stabilization program resulting from the enactment of the Act of October 2, and the issuance of the President's executive order of October 3, subsequent to the (1531) hearing on this application and your appearance before the Commission thereon.

"Sincerely yours,

"(S) JAMES F. BYRNES, *Director.*

"Hon. LEON HENDERSON, *Administrator,*
Office of Price Administration." (1532)

* * *

Part IV

EXCERPTS FROM ORAL ARGUMENT BEFORE THE DISTRICT COURT

Mr. BOOTH. "We also presented, among others, three other exhibits, Exhibits 10, 11, and 12, which reveiwed the financial history of the company under the sliding scale arrangement. I would like to hand copies of those exhibits to the Court. They were admitted in evidence. (2568).

* * *

"* * * On that point I want to refer to the record at page 494, to a statement by Mr. Prettyman, following a suggestion of mine to the Commission that that was one of the issues that would be presented if the Commission accorded us the rights that we were entitled to. Mr. Prettyman stated as follows—Mr. Prettyman is counsel for the company and is here, of course:

"'The first question Mr. Booth mentioned was whether or (2599) not the sliding scale has worked a hardship on the company. There is no such issue in this case. No one claims it has. The question whether it did or did not does not seem to be material in any event. No one is contesting the point.'" (2600).

* * *

Mr. KEECH. "Now, counsel for the Office of Price Administration cited a decision or a memorandum opinion of Mr. Chief Justice Alfred A. Wheat in connection with a case that came before this Court in 1930, I believe, wherein the Public Utilities (2677) Commission sought to bring about a modification in the Sliding Scale Plan in effect. It happened to be my pleasure at that time to represent the Commission, and I was able to sustain the view that we took, that where there was proper notice of hearing and where there were adequate facts to warrant the Commission to function in a particular case, there is a continuing, and necessarily a continuing, jurisdiction in the Public Utilities Commission to deal with the subject of rates.

May I repeat that that case and the decision which I asked for at that time was born of a situation totally and entirely different from that before your Honor in these particulars:

First, there was an investigation called, which in terms provided that as an element to be considered. Subsequent to the order of investigation there was a notice of hearing wherein there was specifically set forth a provision that the subject of rate of return was to be considered. That does not appear in this case, and, therefore, in my opinion, it makes a decided difference.

Now, turning to the Gas Case, it would be made to appear that there was no action, considered deliberation, or (2678) determination made by the Public Utilities Commission leading up to the resulting order which is here before Your Honor on appeal. A consideration of that order would be totally inadequate unless this Court had before it, as our answer does place before you, the history leading up to the Sliding Scale Arrangement.

The Commission had under consideration as a condition precedent to the entering into of any Sliding Scale Arrangement, a full engineering and accounting study looking to a determination of valuation as required by our statute and as recognized by the law of the land. There were thousands of pages of testimony taken; there were hundreds of exhibits in that case; there were months of deliberation on that case, resulting in findings of value for the then Washington Gas Light Company and the Georgetown Gas Light Company.

And may I interject at this point, sir, that there were specific findings with reference to all of the material elements entering into a valuation.

I should say to you that in those valuations, contrary to what has been presented here, there was a deduction for depreciation aggregating approximately $3,000,000, when you take into consideration the two companies. (2679).

Proceeding from that point on, the Commission brought its valuation up to date, and that valuation, after those prolonged hearings and deliberations, was the fundamental part of the Sliding Scale Arrangement which is here before Your Honor today.

And, may I say to Your Honor, that it is very costly, it is a very time-consuming procedure, and under the law existing it was the only method by which the Commission could properly

enter into a Sliding Scale Arrangement, that being a very material and vital element.

Now, the Commission, in the light of its experience with the Potomac Electric Power Company on the Sliding Scale Arrangement, the so-called Washington plan, called a hearing. "(2680).

* * *

Turning again to the present order, of course the Commission can modify the Sliding-Scale Arrangement, under the determination of this Court, providing it gives timely notice. But, mark you, in a Sliding-Scale Arrangement there are many vital elements. It is the same as throwing a stone into a pool of water; the ripples go to all four corners. And to destroy one without giving due consideration to the others you will have a disjointed proposition which will not function: (2681)

* * *

The truth of the matter is that at the time of entering into the Sliding Scale Arrangement there was something like an $800,000 reduction in rates effected in this jurisdiction. That was the first year. And there have been some other reductions. And this is the first time we find ourselves in a position where under the Sliding Scale Arrangement it becomes necessary that consideration be given to an increase in rates. And Mr. Harrison properly suggests that yearly reduction is, of course, a continuing reduction.

With that state of the record it would therefore seem that the Commission was, of necessity, bound, if any change were to be made, to give timely notice. And, furthermore, to (2682) give, and have before it before making the change, facts upon which such a change could be made.

There has been presented to Your Honor here, and there was presented to the Commission at the time of the hearing, many questions. But I do not believe this Court is going to determine this case on questions presented. (2683).

* * *

Starting in August, even in the preliminary hearing, Mr. Booth participated, and throughout the proceedings he participated, argued, filed briefs, asked for continuances and got continuances, some of which he did not use after he got them.

Nevertheless, he asked for them and the Commission did grant them. So much for the Office of Price Administration.

But by the graciousness of the Public Utilities Commission, who were motivated by an interest in getting the facts which would show the inflationary character of the increase that the company was entitled to, it did permit and it did ask it sought from him evidence which would show that to be the fact, if such it be. But the record is void of any evidence relating to that. The record is replete with attempts to enlarge the scope of the proceeding, to have determined in this proceeding law and rules and regulations, which have not been recognized by the Supreme Court of the United States, a departure from that which had been in effect and which had been beneficial to the public and to the (2694) utilities. That is where the parting of the ways occurred so far as Mr. Booth and the Office of Price Administration are concerned. The Commission sought and was anxious to get that which was intended to be given them by virtue of the Act of October 2, 1942. That is what the Commission did not get. But notwithstanding the absence of that, the Commission found and did hold in certain particulars that there should be adjustments because of the possible effect of an inflationary character. (2695).

* * *

What they wanted to have was a hearing in which all factors could be determined. Of course, that embraced valuation, (2698) rates, depreciation, and everything else. That was not within the scope of the hearing. It was not intended by the Act. (2699).

* * *

Mr. HARRISON. "Chairman Flanagan speaking: "'This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding. However, we do not feel that the presentation of such views requires the Office of Price Administration should carry on a double investigation into the accounts of the Gas

Company. This has already been done by our staff, which is competent and experienced.'"

Again, on page 731 of the record of proceedings of September 14th, after having failed all of this time to get (2763) any response to that request, as well as others, Chairman Flanagan again said to Mr. Booth:

"'Mr. Booth, as I have intimated, we are interested in OPA's ideas as to the treatment of income taxes. As to the Sliding Scale Arrangement itself and its terms and the determination as to whether under the terms of that arrangement the company is or is not entitled to a rate increase, as I have repeatedly stated, is one problem. If you are prepared to expand the views of the OPA with respect to said treatment of income taxes, we would be delighted to hear those views.'" (2764).

* * *

Mr. PRETTYMAN. "* * * the Commission declined to retry the valuation case. It declined to adopt another method of computing depreciation, and it declined to retry the rate of return case." (2785)

* * *

Mr. STEVENS. "I wish to address myself for a very few minutes to the proposition that were the Court to set aside this order of the Commission it would level a deadly and staggering blow at the administration of public utility rates in the District of Columbia under the sliding-scale arrangement which is authorized by paragraph 18 of the Public Utilities Act. (2794).

* * *

"Now, I desire to point out to Your Honor that if at the instance of any interested party in any year, that interested party can insist that the Public Utilities Commission go into the classic or orthodox method of fixing rates, then the sliding scale must disappear. The very effort of presenting and trying a full valuation and rate case such as was suggested here would occupy months, first, for preparation, and second for actual presentation of testimony and exhibits. To permit such a thing, to force the Public Utilities Commission at the instance of anybody, to reopen the whole basis of the sliding scale, is to put a premium on interference with the scale whenever it

works in the upward direction and must, it seems to me, nullify the scale itself. (2797).

* * *

"As heretofore stated, this is an arrangement entered into in 1935 either to provide for an increase or decrease in rates, and I submit again, Your Honor, that to force the Public Utilities Commission of the District of Columbia to reopen the sliding scale and to try the classic and orthodox rate and valuation case in each year will effectually prevent the operation of the scale itself, which is, in my judgment, the farthest step that has been made so far to date in this country in an inexpensive and expedient form of rate regulation." (2798)

* * *

The COURT. "Mr. Booth, you have asked an opportunity to (2809) file a brief."

Mr. BOOTH. "It is my thought that it might be helpful to the Court, and yet, of course, as the Court can understand, in view of the importance of the case to our work we thought that a contemporaneous memorandum might be filed by the various parties in about a week's time."

The COURT. "How is that going to help me. Have not all of you stated your positions fully in this record?"

Mr. BOOTH. "I think so, but there have been a great many references to the record and a number of decisions that have been cited, and I think it might be useful if we filed a very short memorandum with the Court within the next five or seven days, depending upon the pleasure of the Court."

The COURT. "I have allowed all of you full time with the idea, primarily, I am going to use the transcript of this record, and if you should repeat over again the things that are already there, it would not be helpful to me. Of course, if there is anything new, I will be glad to have your brief."

Mr. NATHANSON. "Your Honor, we would like to add a word which will not be repetitious."

The COURT. "Let me suggest you avoid repetition. Mr. Reporter, when will you have the transcript?" (2810).

The REPORTER. "Tomorrow."

The COURT. "Does anyone else want to file a brief? I suppose you would like an opportunity to do so if they are going to?"

Mr. PRETTYMAN. "Then we would like to have 48 hours, Your Honor."

Mr. BOOTH. "It was not my thought to file a formal style of brief but only a short memorandum summing up."

The COURT. "Very well."

Mr. PRETTYMAN. "Of course, Mr. Stevens is in New York and we would have to exchange correspondence. We would like to file a reply brief."

The COURT. "Let me suggest the appellants file anything they have to file within one week, or prior to the 31st. Is that time enough?"

Mr. BOOTH. "That is ample time. We may file it sooner than that."

The COURT. "The appellees may have a week in which to reply."

Mr. BOOTH. "That is, a week from the time we receive ours, so if we send it sooner, they will have no more than that." (2811).

The COURT. "Yes. Let me urge you be as brief as you can so as to save as much reading on my part as possible."

Mr. HORSKY. "We will not file a brief, Your Honor."

The COURT. "All of you at times have used copies of the laws, and I should like to have those."

Mr. KEECH. "I shall see that you get those, Your Honor."

The COURT. "We have Judge Byrnes' law and Mr. Henderson's law and the law creating the Public Utilities Commission and these other matters, and it would make it much more easy for me to have those than to have to dig them out."

Mr. KEECH. "I will be glad to see that is done. * * *"

EXHIBITS

EXHIBIT 8

(Rec'd in evidence September 14)

Washington Gas Light Company, Prince Georges Gas Corporation—Comparison of company, Public Utilities Commission accountants', and Office of Price Administration computation of net income available for return in accordance with PUC Order #1458

TEST YEAR ENDED JUNE 30, 1942

	Company	PUC Accountants	OPA
Rate Base	$28,091,461	$28,088,332	$28,088,332
Adjusted Operating Revenues	8,918,656	8,918,656	8,918,656
Operating Expenses:			
Operation and Maintenance	6,002,034	5,970,538	5,970,538
Depreciation	348,070	348,070	
Depreciation (6¼%—43-year sinking Fund on $26,000,000)			120,722
General Taxes	603,996	604,916	604,916
Federal Income Taxes	526,440	494,417	
Federal Income Taxes (see Note (a))			234,848
	7,480,540	7,417,941	6,931,024
Adjustments	71,997	66,545	66,545
Total Adjusted Operating Expenses	7,552,537	7,484,486	6,997,570
Adjusted Net Operating Revenues	1,366,119	1,434,170	1,921,077
6.50% of Rate Base	1,825,946	1,825,742	1,825,742
Defect in Basic Return	459,827	391,572	
Excess in Basic Return			95,335
Amount Available for Rate Increase	383,189	326,310	
Amount Available for Rate Reduction			47,668

Note (a): $\frac{\$494,417}{40} \times 19 = \$234,848.$

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EXHIBIT No. 10

Washington Gas Light Company—Surplus, reserve for depreciation, and dividends declared

Year	Earned surplus, December 31	Depreciation reserve, December 31	Dividends declared
1936	$5,398,927	$879,289	$468,000
1937	5,666,264	1,154,141	520,621
1938	5,142,725	1,418,862	631,071
1939	5,613,350	1,601,292	771,467
1940	6,022,619	1,902,697	879,287
1941	6,271,626	2,171,608	907,538

Source: Washington Gas Light Company, Annual Report to Stockholders.

EXHIBIT No. 11

Washington Gas Light Company—Rate bases, earnings, rates of return, and rates reduction [1]

Test Year Ended	Rate base for the year (weighted)	Net income (return) earned	Rate of return earned	Excessive earnings	Portion of excess earnings to be applied to subsequent rates reductions
			Percent		
June 30, 1936	$21,052,619	$1,460,303	6.94	$91,883	$47,433
June 30, 1937	21,937,559	1,432,217	6.53	6,276	[2] 3,138
June 30, 1938	23,145,728	1,603,208	6.93	98,736	50,492
June 30, 1939	24,119,927	1,866,295	7.74	298,500	[2] 163,575
June 30, 1940	25,218,909	1,766,064	7.00	126,835	[2] 63,417
June 30, 1941	26,282,275	1,579,809	6.01	[3] 128,539	0
Total				493,691	
Average			6.86		

[1] All figures in this table are after allocation to exclude amounts applicable to gas sold for consumption outside of the District of Columbia.

[2] All or a portion of the amounts so designated have been used to partially determine the aggregate amount of rates reductions for a "rates year" later than the immediately succeeding "rates year."

[3] Negative item.

Source: Twenty-eighth Annual Report of the Public Utilities Commission, of the District of Columbia, 1940.

EXHIBIT No. 12

Washington Gas Light Company—Rates of return on average capital employed, company basis

Year	Average capital employed		Income applicable to average capital employed	Rate of return	
	Excluding added appraiser value	Including added appraiser value		On capital employed excluding added appraiser value	On capital employed including added appraiser value
Before deducting Federal income taxes:					
1927	$14,189,521	$21,212,049	$1,375,225	9.7	6.5
1928	14,992,339	22,044,867	1,466,594	9.8	6.7
1929	16,012,500	23,065,028	1,577,170	9.8	6.8
1930	17,174,742	24,227,270	1,561,589	9.1	6.4
1931	18,610,228	25,662,751	2,021,002	10.9	7.8
1932	19,712,043	26,764,571	1,869,492	9.5	7.0
1933	20,212,156	27,264,684	1,855,930	9.2	6.8
1934	22,226,071	29,278,599	1,995,904	9.0	6.8
After deducting Federal income taxes:					
1927	13,818,995	20,871,523	1,237,225	9.0	5.9
1928	14,914,790	21,967,318	1,347,674	9.0	6.1
1929	15,928,581	22,981,109	1,506,436	9.5	6.6
1930	17,100,037	24,152,565	1,484,441	8.7	6.1
1931	18,541,954	25,594,482	1,959,715	10.6	7.7
1932	19,616,662	26,669,190	1,786,014	9.1	6.7
1933	20,096,177	27,148,705	1,798,742	9.0	6.6
1934	22,040,240	29,092,762	1,868,604	8.5	6.4

NOTE.—The appraiser value is the increase in the book value of the company's plants made as the result of independent valuations in 1903 and 1909.

Source: Federal Trade Commission report on Utility Corporations made in response to Senate Resolution No. 83, 70th Congress, Volume 84-1, Page 882.

U. S. GOVERNMENT PRINTING OFFICE: 1943

TUESDAY, MAY 18TH A. D., 1943.

Before Honorable Morris A. Soper, Circuit Judge, sitting by designation, and Honorable Justin Miller and Fred M. Vinson, Associate Justices:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

On motion of Mr. E. Barrett Prettyman, Mr. Stoddard M. Stevens, Jr., of the Bar of the State of New York, was allowed to appear for appellant in Nos. 8501 and 8503 pro hac vice by special leave of Court, and said appellants were allowed to file printed reply brief.

On motion of Mr. Lloyd B. Harrison, attorney for appellant in Nos. 8502 and 8504, said appellant was allowed to file typewritten reply brief, printed copies to be filed after argument.

Argument commenced by Mr. E. Barrett Prettyman, attorney for appellant in Nos. 8501, 8503, continued by Messrs. Lloyd B. Harrison, attorney for appellant in Nos. 8502, 8504 and Harry R. Booth, attorney for appellee in each case, and concluded by Mr. Lloyd B. Harrison.

United States Court of Appeals for the District of Columbia

April Term, 1943

[Filed June 1, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Before: SOPER, Circuit Judge, sitting by designation, and MILLER, Associate Justice

Order

Because of the resignation of Mr. Justice Vinson as a member of the United States Court of Appeals on May 29, 1943, it is ordered by the Court that the above entitled appeals be, and they are hereby, set for reargument on Friday, June 4, 1943, at 2:30 p. m.; argument on each side limited to one hour.

Dated June 1, 1943.

Per curiam.

FRIDAY, JUNE 4TH, A. D. 1943.

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Morris A. Soper, Circuit Judge sitting by designation, and Honorable Justin Miller, Associate Justice:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Reargument commenced by Mr. E. Barrett Prettyman, attorney for appellant Washington Gas Light Company, continued by Mr. Lloyd B. Harrison, attorney for appellant Public Utilities Commission, by Mr. David F. Cavers, attorney for appellee in each case, by Mr. Harry R. Booth, attorney for appellee in each case, and concluded by Mr. E. Barrett Prettyman, attorney for appellant Washington Gas Light Company.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT,

v.

FRED M. VINSON ~~JAMES F. BYRNES~~, DIRECTOR OF ECONOMIC STABILIZATION, by PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION of the DISTRICT OF COLUMBIA, APPELLANT,

v.

FRED M. VINSON ~~JAMES F. BYRNES~~, DIRECTOR OF ECONOMIC STABILIZATION, by PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION of the DISTRICT OF COLUMBIA, APPELLANT,

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Appeals from the District Court of the United States for the District of Columbia.

Reargued June 4, 1943. Decided July 26, 1943.

Mr. E. Barrett Prettyman, with whom *Messrs. F. G. Awalt, Raymond Sparks* and *C. Oscar Berry* were on the brief, for appellant in Nos. 8501 and 8503. *Mr. Stoddard M. Stevens, Jr.*, of the Bar of the State of New York, who was allowed to appear for appellant in Nos. 8501 and 8503, *pro hac vice*, by special leave of Court, was also on the brief.

Mr. Lloyd B. Harrison, Special Assistant Corporation Counsel, D. C., with whom *Messrs. Richmond B. Keech*, Corporation Counsel, D. C., and *Vernon E. West*, Principal Corporation Counsel, D. C., were on the brief, for appellant in Nos. 8502 and 8504.

Messrs. Harry R. Booth, Utilities Counsel, Office of Price Administration, and *David P. Cavers*, Assistant General Counsel, with whom *Messrs. George J. Burke*, General Counsel, *W. Russell Gorman* and *Howard S. Guttman* were on the brief, for the appellee in each case, and appeared by authority of the Price Administrator.*

Before GRONER, C. J., SOPER, Circuit Judge sitting by designation, and MILLER, Associate Justice.

SOPER, *Circuit Judge*: These appeals are brought to test the validity of an increase in gas rates in the District of Columbia authorized by the Public Utilities Commission of the District but objected to by the Director of Economic Stabilization and his representative in this matter, the Administrator of the Office of Price Administration.

On October 13, 1942 the Public Utilities Commission, one Commissioner dissenting, issued an order whereby an increase of the rates and charges of Washington Gas Light Company for the twelve month period beginning September 1, 1942 was authorized. The order was passed in a proceeding instituted by the Commission on March 20, 1942 for the purpose of adjusting the rate of the company in conformity with a sliding scale arrangement established by the order of the Commission on December 13, 1935 under the Public Utilities Act of the District of Columbia, Section 43-317, D. C. Code, 1940. The Commission then found the rate base as of June 30, 1935, exclusive of working capital, to be $21,000,000 and the fair rate of return to be 6½ per cent. Under the sliding scale plan the accounts of the company have been audited by the Commission annually since 1935 and the rate base has been kept up to date by adding new property at cost and by deducting retired property; and the earnings of the company for each twelve month period ending June 30th have been ascertained so as to fix the rates for the ensuing year beginning on September 1st according to the formula that if the return for the preceding year was greater or less than 6½ per cent, the rates for the ensuing year would be decreased or increased in certain proportions. For example, if the return for the preceding year was between 5½ and 6 per cent, an increase would be made to raise the rate three-quarters of the way up to 6½ per cent.

In operation such a sliding scale plan gradually works towards a rate base valued at cost since additions to the property are recorded at cost; and in periods of continuously rising prices, such as have prevailed since 1935, the plan results in a rate base in each year of less than actual value at that time. In such a period the plan also produces less than the original rate of return fixed by the Commission because estimated expenses for the ensuing year are placed at the level of the year that has just past. In actual experience in the District of Columbia the plan has resulted in reductions in rates for each year in the intervening period, except in 1937 and in 1941 when no changes were made. The calculations made in August, 1942 showed that in the preceding test year the company had earned 4.87 per cent on the rate base. The Commission's accountants reported that under the sliding scale arrangement, disallowing all excess profits taxes, the company was entitled to an increase in rates of $326,000 while the figures presented by the company showed that it was entitled to an

* 7 Fed. Reg. 7910.

increase of $383,000. The order of the Commission authorized an increase of $201,424.74. In other words, the increase allowed was approximately $123,000 less than that indicated by the sliding scale. It is estimated that this increase will permit the company to make a net return of 5.58 per cent on the rate base.

The interest of the Director of Economic Stabilization and of the Administrator of the Office of Price Administration, referred to herein interchangeably as the Price Administrator, grows out of the possible inflationary effect of an increase of gas rates upon an increase of prices generally which Congress sought to check by the passage of the Emergency Price Control Act of 1942 approved January 30, 1942, 56 Stat. 23, 50 U. S. C. A. (App.) § 901 (a) *et seq.* and the amendment thereof by the Inflation Control Act of October 2, 1942, 56 Stat. 50 U. S. C. A. (App.) § 961 *et seq.* That the interest of the Price Administrator in this rate proceeding is legitimate was recognized by the Commission from the beginning, although § 302 (c)(2) of the Price Control Act contains the express provision that "nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility". Counsel for the Price Administrator was present at the pre-trial conference on August 18, 1942 and throughout the subsequent hearings in August and September, and was given full opportunity to participate within the scope of the proceedings fixed by the Commission. The hearings came to a close on September 30, 1942 and, as we have seen, the Commission's decision and order were filed on October 13, 1942. In this order the Commission directed the attention of the company to the following provision contained in the Amendatory Act of October 2, 1942, which had been passed in the meantime:

> "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase." (50 U. S. C. A. (App.) Sec. 961.)

By executive order promulgated on October 3, 1942 under this quoted provision of the amendatory Act, 7 Fed. Reg. 7871, the President established the Director of Economic Stabilization and designated him as the agency to receive notice of any increase in public utility rates; and on October 14, 1942, the Director designated the Price Administrator as his representative in proceedings affecting utility rates. On October 14 the company gave the required thirty days notice of the proposed increase to the Price Administrator and he promptly made application that he be allowed to intervene in the proceeding and that the order of the Commission of October 13, 1942 increasing the rate be vacated. The Commission, by order of October 23, 1942, reopened the case for the purpose of receiving from the Price Administrator additional evidence relating to the inflationary

effect, if any, of the increase in rate previously authorized, and granted intervention for this purpose; and the formal consent of the company to the intervention was filed on October 30, 1942. Additional hearings were held on two days at which little change was made in the evidence, and on November 9, 1942 the Commission refused to vacate its order of October 13, 1942. Subsequently, petitions for reconsideration were filed on behalf of the Price Administrator and the Director, and these petitions were denied by the Commission on November 16, 1942. The result was that effect was then given to the order of October 13, 1942, increasing the rates for the twelve month period beginning September 1, 1942, which had been under reconsideration during the reopening of the proceedings. Both the Director and the Price Administrator appealed to the District Court under the provisions of Title 43-705 of the District Code, from the order of October 13, 1942, allowing the increase, and also from the order of October 23, 1942 reopening the proceedings for the limited purpose indicated. The District Court, after hearing, decreed that the order of the Commission be vacated but stayed its judgment pending appeal to this court, upon agreement of the Company to make proper refund to consumers if the decision should be affirmed. Subsequently it appeared that the certified copy of the proceedings before the Commission was not actually before the District Court at the time of its hearing and decision, as contemplated by Title 43-705 of the District Code, and thereupon a motion was filed by the Commission and the Company for a reconsideration of the court's decision, but this petition was denied. The appeals of the Director of Economic Stabilization and of the Price Administrator from both of the orders of the Commission constitute the subject matter now before this court.

Two contentions advanced by the opposing parties to this appeal will first be considered because they go to the form rather than the substance of the controversy and in our opinion are devoid of merit. On behalf of the Price Administrator it is contended that the judgment of the District Court should be sustained because the Commission's order of October 13, 1942 authorizing an increase in the rates was issued after the passage of the Act of October 2, 1942 without complying with the requirements of that Act for prior notice to the President's agency and consent on the part of the Utility to a timely intervention by the agency in the proceeding before the Commission. This recital of facts is correct as far as it goes but it takes no account of the notice served on the Price Administrator on October 14, 1942 or of the reopening of the case and the intervention of the Price Administrator and the opportunity afforded him to be heard during the period ending November 16, 1942 when the reopened proceedings came to an end and the Commission finally determined to stand by its order of October 13, 1942. The notice of October 14, 1942 was thus given thirty days before the final determination of the Commission. Moreover the contention ignores the fact that the amendatory Act brought about no substantial change in the parties to the proceeding, since the Administrator of the Office of Price Administration, who was designated to represent the Director of Economic Stabilization after the passage of the amendatory Act, had been in the proceeding from the beginning and was represented both before and after the passage of the amendment

by the same attorney. Everything that could be said by the Director of Economic Stabilization in opposition to the increase of rates had already been said by the Administrator of the Office of Price Administration throughout the proceeding and was reaffirmed after the intervention of the Director. In short, the contention does not go to the substance of the matter and the provisions of the amendatory Act requiring prior notice and consent to intervention by the Presidential agency were complied with.

On the other hand, a contention of the Commission and of the Company that the decree of the District Judge should be reversed because he did not have the record of the case before the Commission physically before him at the time of his decision is also without substantial merit. It is based upon Title 43-705 of the District Code that any appeal from a decision of the Commission shall be heard upon the record before the Commission, and that no new evidence shall be received. Reliance is also placed upon decisions which hold that there is an absence of due process if the judgment of a court is not based upon a consideration of the record. Morgan v. United States, 298 U. S. 468, 304 U. S. 1. We think it is clear, however, that the material parts of the record were in effect brought to the attention of the District Judge at the time of the hearing and before his decision was rendered. There is in fact no contention that he was not substantially advised of the merits of the controversy from the briefs and arguments of counsel. Moreover, it appears that he made a close examination of the record when the motion to reconsider the decision was before him and found nothing therein to alter the opinion which he had already reached. Under these circumstances it is obvious that the objection is formal rather than substantial, and that no good purpose would be served by remanding the case to the District Judge for further consideration.

The important issue in the case turns upon the action of the Commission in confining the rate investigation to an application of the sliding scale to prevailing conditions and a consideration of the possible inflationary effect of a price increase, and in refusing a demand of the Price Administrator that a thorough going examination be made into the rate base, the rate of return, operation expenses and depreciation, and all other matters relative to the establishment of a fair return. The position of the Price Administrator is based in part on his interpretation of the price control statutes and in part upon his contention that he was denied the full rights of an intervenor to which he was entitled under the amendatory Act.

With respect to interpretation* the Price Administrator contends, on the strength of a clause contained in Section 1 of the amendatory

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* The particular provisions of the Emergency Price Control Act of January 30, 1942, and of the Amendatory Act of October 2, 1942, which are interpreted herein, are as follows:

ACT OF JANUARY 30, 1942.

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited

Act, that the powers of the Commission to regulate utility rates in the District of Columbia was cut down and restricted by the amendment so that the Commission can now grant an increase in utility rates only to the extent that it finds it "necessary to aid in the effective prosecution of the war or to correct gross inequities". In deciding this question consideration of course must be given to the underlying salutary purpose of the original Act as shown in Section 1

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incomes, consumers, wage earners, investors, and persons dependent on life insurance annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Section 2 (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have arisen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 * * * for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ending October 1, 1941. * * *

Section 302 (c) * * * Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

ACT OF OCTOBER 2, 1942.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c) and clause (1) of section 302 (c) of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

Sec. 7 (c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering * * *; * * * to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors * * * from undue impairment of their standard of living; * * * to assist in securing adequate production of commodities and facilities". It is also necessary to give proper weight to the cognate purpose of the amendatory Act as shown by Section 1 thereof to supplement and further effectuate the purpose of the original Act and to aid in the effective prosecution of the war by enlarging the power of the President and authorizing him to issue a general order "stabilizing prices, wages and salaries, affecting the cost of living"; such stabilization "except as otherwise provided in this Act" to be as far as practicable "on the basis of the levels which existed on September 15, 1942". The subsequent period was taken care of by giving the President power "except as otherwise provided in this Act" thereafter to "provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities". This grant of power is subject to the proviso that no public utility "shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increases".

The contention of the Price Administrator is that this section first gives the power to the President to stabilize all prices, including utility rates, on the levels existing on September 15, 1942, and then sets up a definite standard for subsequent adjustments; and that the proviso merely alters the method whereby increases in utility rates may be made, by taking the power away from the President and giving it to the Commission, but retains the standard which must be applied to all increases whether authorized by the President or the Commission. This construction, however, is seen to be strained and unnatural when all the relevant provisions of the original Act and of the amendatory Act are taken into consideration. In the first place, it is noteworthy that the standard specified in § 1 of the amendatory Act as the necessary basis for a price increase, that is, the furtherance of the war or correction of gross inequities, is set for the guidance of the President and not for the regulatory agencies. To find their governing standards recourse must be had to the statutes creating them and outlining their powers. Congress had in mind in passing the original Act that utility rates are subject in the District of Columbia and almost everywhere else to the control of regulatory bodies and are therefore not exposed to "speculative, unwarranted, and abnormal increases." Accordingly Congress provided in § 302 (c) of the Act "that nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees or (2) rates charged by any common carrier or other public utility, * * *".

In contrast with this limitation is the power conferred upon the Price Administration by § 2 (a) of the original Act to establish the

maximum price of a commodity which has risen or threatens to rise to an extent inconsistent with the purposes of the Act, giving due consideration to the prices prevailing between October 1 and October 15, 1941, and the further power to make subsequent adjustments for relevant factors, including speculative fluctuations, general increases or decreases in cost of production, etc., during the year ending October 1, 1941. It is obvious that utility rates were excluded from the subject matter over which the Price Administrator was given broad powers of control in the original Act.

It is equally clear that the power of regulatory bodies to fix utility rates was left unchanged by the amendatory Act except that the designated agency of the President was given the right to intervene and to be heard in any rate proceeding before any increase in rate in force on September 15, 1942 could be made effective. Power was given to the President to stabilise prices at the levels of September 15, 1942 "except as otherwise provided by this Act"; and power was also given him to make adjustments thereafter if he should find it necessary to expedite the war or correct inequities "except as otherwise provided in this Act". The other provisions, to which these exceptions relate, include Section 2 of the amendatory Act wherein the President was given power to suspend the provisions of Section 3 (a) and Section 3 (c), and clause 1 of Section 302 (c) but was denied authority to suspend any other law or part thereof. Also relevant to these exceptions is Section 7 (c) which expressly provides that nothing in the Act shall be construed to invalidate any provision of the original Act except to the extent that such provisions may be suspended under the authority of Section 2. As we have seen, clause 302 (c) of the original Act forbad the regulation of (1) compensation paid by an employer to his employees and (2) rates charged by any public utility. For our purposes it is especially significant that although the President was given power to nullify the prohibition against the regulation of wages contained in the original Act the power to nullify the prohibition in that Act against the regulation of utility rates was denied him.

No room is left for the argument that the standard applicable to price regulation by the President after September 15, 1942 was also imposed upon regulatory commissions generally and upon the Public Utilities Commission of the District of Columbia in particular. If such had been the purpose of Congress there is no good reason why it failed to express it, especially as the powers of the Commission had already been fixed by Congress itself in the Public Utility Act of the District of Columbia, and repeals by implication are not favored. Even more persuasive is the proviso in Section 1 of the amendatory Act, which is the only part of the Act that expressly refers to public utilities and increases in rates over those in effect on September 15, 1942. This proviso clearly recognized the power of the Public Utilities Commission of the District of Columbia and other regulatory bodies to fix utility rates, and leaves this power undisturbed except that it imposes upon utilities seeking an increase the duty to give thirty days notice to the President's agency, and to consent to its timely intervention before any general increase in rate in effect on September 15, 1942 can be made in a rate pro-

ceeding. A corollary of this duty of the Utility is of course the duty of the regulatory body to accord the intervenor a fair hearing.

The legislative history of the amendatory Act of October 2, 1942 supports this conclusion. When the bill was before the Senate, Senator Norris submitted an amendment which was adopted by the Senate that provided that rates charged by a public utility should not be increased without the consent of the President. But this amendment was rejected when the bill went into conference, and the proviso in § 1 of the Act as it now stands was substituted. When the conference report was returned to the Senate the subject was discussed at length by Senator Norris and certain interchanges took place between him and Senator Brown during the debate. The latter is party to the pending appeal in his capacity as Administrator of the Office of Price Administration. It clearly appears from their remarks that the senators understood that the opportunity afforded the President's representative to intervene in a rate hearing did not confer upon him the power to participate in the decision or to control the proceeding, but merely the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation, with the right of appeal where the Commission's action is reviewable by the courts. In short, as Senator Norris expressed it, the Act conferred no technical relief but only a great moral effect which would flow from an unwarranted opposition of a regulatory commission to the efforts of the Price Administrator to check inflation. See 88 Cong. Rec. 155, 7443, 7877-8, 7901, 7971, 7973, *et seq.*

It will be perceived that this interpretation gives effect to the proviso in that it preserves the power of the regulatory body, while exposing it to the public appeal of a government official charged with the administration of an act of Congress designed to protect the welfare of the entire nation. The record in this case shows that the intervention of the Price Administrator was not without influence or effect. The Commission was not oblivious to the economic conditions consequent upon the war and did not disregard them in formulating its findings and opinion. It pointed out that its responsibilities were twofold, that is, to determine what increase, if any, the company was entitled to under the sliding scale for the ensuing year and also to give recognition to the existing economic situation and the ability of the company to finance needed plant extension and render adequate service to consumers at the nation's capital. The intervention and assistance of counsel for the Price Administrator were noted, and findings, supported by substantial evidence, were made to the following purport and effect:

The Commission's accountant computed that the company was entitled under the sliding scale to a rate increase of $324,718.06, while the company's accountants computed that the increase should be $381,597. The difference between these amounts was caused by certain adjustments of operating expenses and taxes made by the Commission's accountant, which the Commission adopted. The Commission, however, did not allow even the full amount of the increase indicated by its accountant's calculation, but deducted the additional sum of $123,293.32, making the net increase $201,424.74.

This result was accomplished (except for the deduction of one negligible item) by including accruals for federal income taxes at the rate of 31 per cent for the last six months of the test year ending June 30, 1942, instead of 40 per cent as provided by the sliding scale. On this point the Commission said:

> "However, present-day conditions compel us to consider whether accruals for Federal income taxes at rates considerably higher than rates in effect in previous years should be allowed in their entirety for rate-making purposes. Much has been said recently regarding the allowance of Federal income taxes on a normal-year basis rather than on the basis prevailing in a so-called 'abnormal year.' Our difficulty here lies in the necessity for making a distinction between normal and abnormal taxes. It is true that rates of taxation imposed during the year 1941 and proposed for the year 1942 are substantially in excess of rates imposed in prior years. However, it requires very little imagination to foresee that the proposed rate for 1942, while such rate is abnormal as compared with the rates in effect in prior years, may well be a normal or even a subnormal rate for some years to come. After weighing all factors to the best of our ability, we conclude that for the purpose of determining the amount available for rate increase for the rate year beginning September 1, 1942, the calculation of Federal income taxes for the test year under consideration (July 1, 1941, through June 30, 1942) at the rate of 31% is reasonable. Such a calculation will result in a further decrease of $115,863.09 in adjusted operating expenses and will eliminate the adjustment of $4,929.39 to provide for increase in taxes under the provisions of Section 6 of the sliding scale arrangement.
>
> With respect to excess profits taxes, we are of the opinion that no increase in rates should be predicated upon the liability of a utility for excess profits taxes. For this reason we have disallowed as an operating expense for the test year ended June 30, 1942 the excess profits tax of $43,928.02, in order to prevent the direct inflationary effect which such allowance would invite.
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> The record indicates that the Company will not be liable for excess profits tax for the year 1942*. * * *"

The Commission gave especial attention to the financial condition of the company and its need for additional capital. In this respect it said:

> "There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of extending its plant to meet the growing demands for gas service. We must weigh the necessity for an increase

* The Commission eliminated from operating expenses excess profits taxes paid by the company for the year 1941 although it recognized the equity of a contention of the company that it would not have been liable for these taxes if the Commission had been in a position to act promptly on its application for the issuance of additional preferred stock in 1941 to which reference is hereafter made.

in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The District of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service.

It is a matter of record that the Company recently attempted to sell 40,000 shares of $5.00 cumulative preferred stock, but was successful only to the extent of being able to sell 18,206 shares of this stock. This was due to a number of factors and a recitation of events and facts preceding and subsequent to the offering of this stock shows that the financial position of the Company merits our most serious consideration.

On January 17, 1941, the Company filed an application with this Commission for authority to increase its capitalization by 90,000 shares of $4.25 preferred stock. Due principally to the lack of a quorum on the Commission this application was not acted upon until March 26, 1942 (Order No. 2221). At that time, due to depressed market conditions, the Company was unable to sell this newly created stock and endeavored to sell 40,000 shares of its $5. cumulative preferred stock with the result heretofore stated. In approving the sale of the $5.00 stock the Commission considered, among other factors, the financial position of the Company as of December 31, 1941. At that time income deductions and preferred dividends were earned 1.88 times, and the earnings per share of common stock were $2.24. Our order was issued April 21, 1942, and income for the twelve months ended April 30, 1942, showed that income deductions and preferred dividend coverage had declined to 1.75 times, while earning per share of common had declined to $1.96. For the twelve months ended July 31, 1942, the former figure had declined to 1.67 times and the latter to $1.80. This decline in income is not due entirely to increased provision for Federal income taxes. Substantial increases in the cost of labor and material have occurred during the period under discussion, and such increases have been provided for only in part in the determination of the amount available for rate increase. Labor costs included in operating expenses for the test year under consideration exceed labor costs for the prior test year by more than $300,000, a part of which was attributable to the increased volume of business."

Finally, after careful consideration of all factors having a bearing on the case, including the credit position of the Company, the Commission reached the opinion that there should be an increase in rate of $201,424.74 under the sliding scale arrangement. In respect to the potential inflationary influence of this increase the Commission said:

"This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend

to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure."

• • • •

"The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase. Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating customers' bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year."

"The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies."

Manifestly, the order of the Commission was issued only after a deliberate and careful study of the factors affecting the business of the utility in wartime Washington without a trace of hasty or arbitrary conduct on the Commission's part. The findings of such an administrative agency, where there is evidence to support them, may not be set aside by the courts; Swayne & Hoyt Ltd. v. United States, 300 U. S. 297, 304; Norfolk & Western Ry. Co. v. United States, 287 U. S. 134; American Telephone & Telegraph Company v. United States, 299 U. S. 232; and in this case the findings of the Commission in the application of the sliding scale are not seriously disputed. Indeed the Commission did not give the Utility all the advantage to which the sliding scale entitled it. Thus, the Commission allowed accruals for income taxes at the rate of 31 per cent although the sliding scale provided for an allowance of 40 per cent; and this reduction cost the company $123,000 in revenue for the ensuing year. Moreover, substantial increases in the cost of labor and material, common to all kinds of business during the war, were compensated for only in part in determining the increase of rates allowed, so that it was held down to the sum of $200,000. The conservatism of this action is demonstrated by the finding of the Commission, based on convincing evidence, that the company could not finance its needs and install the extensions required to fill the demands of the "No. 1 Defense Area of the United States", unless the decline in earnings was arrested and the principles of the sliding scale arrangement, on which the credit position of the company depended, were preserved. Viewed from this standpoint, it becomes clear that the intervention of the Price Administrator was not in vain. Indeed it would be difficult to say that the Commission did not comply with the standard imposed by the amendatory Act upon the adjustment of prices other than utility rates, that the adjustment be found "necessary to aid in the effective prosecution of the war or to correct gross inequities". Certainly the risk of such inflation as might be expected to follow from

increase of 1/37 of 1 per cent in the cost of living in the District Columbia was amply justified.

The principles of the sliding scale were the subject of careful consideration when it was proposed by the People's Counsel and accepted the utility in 1935. Acceptance by the utility was necessary since e statute, District Code Title 43-306, required that the Commission alue the property of a utility at its fair value and the sliding scale rangement eventuates in the course of time in a cost valuation. itle 43-317 permits a public utility to adopt a sliding scale of rates nd dividends, if it is found by the Commission to be reasonable and ust. Such an arrangement involves the basic elements of rate making, ncluding a rate base, a fair rate of return and a correct determination f revenues, expenses and depreciation; and in its operation, capital dditions and retirements as well as revenues and expenses are subect to constant supervision and control of the Commission.

In the case of the Washington Gas Light Company, as we have seen, he system has brought about a reduction in rates in each year since 935, except 1937 and 1941 when no change was made. All additions o the property have been entered at cost, and in the period of rising rices the gap between the present value of the property and the ate base allowed under the scale has widened. Likewise, the estiated expenses based in each year on the expenses of the preceding ear have proved too small, and the rate of return has fallen to 4.87 er cent instead of 6½ per cent allowed in 1935. Meanwhile, the benfit of economies has been transferred to the consuming public, and he accumulation of a cash reserve by the company to meet the growng demands of the community has been precluded. It was under hese circumstances that the Commission held that the need for an ncrease of rates was imperative, and that the sliding scale should be pplied as it had been in previous years when it brought about a decrease in rates.

The District Judge in his consideration of the case found no fault with the propriety of the sliding scale or the manner in which it has heretofore been applied by the Commission; but he held that the scale should now give way in deference to the Congressional policy expressed in the Price Control Statutes. On this point he said:

> "The sliding scale arrangement is not a contract, certainly not one which binds the public. It must give way to public policy and to Congressional enactment which expresses that policy. The Commission in good faith has sought to fulfill its obligations under the sliding scale arrangement but may have lost sight of the check upon it which has been voiced by Congress. I am not unmindful that the effort and the cost in bringing about the sliding scale arrangement was very great. I think it was the result of fair and honest judgment and has been found to be a good workable and economical plan, but it must now be subjected to a test not previously required."

In view of the new statutes the judge concluded that it had become the duty of the Commission, upon the request of the Price Administrator, to reconsider the basic principles of the sliding scale, and that when the Commission refused to undertake this task, its action was "arbitrary and illegal". As to the scope of the investigation demanded by the Price Administrator the judge said:

"The Price Administrator claims that notwithstanding he was permitted to intervene the Commission nullified the permission by refusing to reconsider the basic principles of the sliding scale arrangement in the light of the economic conditions and the Government's program to prevent inflation. Appellants contend that by its rulings and pronouncements it limited its consideration to such data as would enable it to apply the formula of the sliding scale arrangement in determining what rates were authorized by the sliding scale arrangement."

There can be no doubt that the judge correctly stated the position of the Price Administrator as demanding a full and exhaustive examination into the rate base, the rate of return, the operating expenses and method of depreciation, and all other elements that usually enter into a utility rate investigation by a regulatory commission. In his brief in this court the Price Administrator said:

"* * * It (the Commission) was under a legal duty to exercise the full measure of its statutory powers to prevent an increase in utility rates. It was, therefore, incumbent upon the Commission to reconsider all basic elements of the sliding-scale arrangement. Only by doing so could the Commission find whether the Company would be subjected to undue hardship if a rate increase was denied, or whether the increase was necessary to cure a gross inequity or to aid in the prosecution of the war."

During the course of the hearing before the Commission, there was much informal discussion and many subjects were touched upon; but the most precise and comprehensive statement of the attitude of the Price Administrator as to the scope of the investigation is contained in the following statement then made by his attorney:

"* * * We must be given the right to examine every issue which the courts have held enters into the making of fair and reasonable rate regardless of the terms of sliding-scale arrangement or previous conclusions by the Commission that a rate increase is justified. If we are to comply with applicable judicial principles affecting the question of fair and reasonable rates, we must have the right to go into at least the following factors:

(1) What is a proper rate base? And on that point an inquiry should be made and promptly as to why the rate base should not be predicated upon the original cost of the Company property. Why should the rate payers be compelled to pay increase rates upon a rate base largely in excess of the original cost of the Company's property?

(2) What are fair operating expenses of the company? Here the question of depreciation expense is a serious problem as far as the public is concerned since accrued depreciation was not deducted from the rate base.

(3) What are other proper operating expenses? Here the minority opinion by Commissioner Hankin must be given fair and adequate consideration.

(4) What are proper income taxes to be allowed or should the Company's customers pay its war taxes?

(5) What is a fair rate of return for this Company in the light of current economic conditions.

It must be of course clear that a full and complete inquiry for the purpose of determining what are fair and reasonable rates, must be made in order that the Commission may comply with its duty under the law * * *".

In respect to each of these matters the Price Administrator asserted that the Company was receiving an undue advantage under the sliding scale. For example, he said that the rate base was overvalued and should be revalued at original cost; that even without adjustment on the basis of the sliding scale the Company would earn a return of 5 per cent in the ensuing year, which was sufficient under wartime conditions; that the method of computing retirement accruals contained in the sliding scale was more favorable to the Company than an annual allowance for depreciation such as was approved (for a business of limited life) by the Supreme Court in Power Commission v. Pipeline Co., 315 U. S. 575; that the Commission should not consider the 31 per cent income tax of 1941 as a normal pre-war tax and permit the Company to deduct it as an operating expense; and that other expense allowances were excessive.

All of these matters were discussed at great length during the extended hearings before the Commission. They were offered as reasons which, taken together, required a complete rate investigation. Indeed all of the subjects were so tied together that no substantial change could be made in one without a survey of the entire field. The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was in no position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails. What he desired was an indefinite postponement of any increase in rates pending an exploratory investigation by the Commission in which he was willing to assist as best he could. As he said in his brief in this court:

> "In the proceeding before this Commission, OPA and OES sought to enlighten the members of the Commission as to this program and the need for wholehearted support of the Commission. We also sought to explore with the Commission the factors to be considered in determining what the Company's earnings have actually been and what they probably will be. We also sought to show that the change in economic conditions which had taken place since 1935, when the sliding-scale arrangement was made, required the Commission to take the appropriate steps to reconsider the arrangement."

In furtherance of this object the Price Administrator requested that the Commission undertake a revaluation of the Company's rate base by applying a method that is in conflict with the provisions of Title 43-306 of the District Code wherein it is provided that the Commission shall value the property of every public utility in the District at the fair value thereof at the time of the valuation. In disregard

of this governing statute the Price Administrator makes the following statement in his brief in this court:

> "Nevertheless, appellees have not requested the making of a valuation of the property of appellees. The Government's view is that the rate base in utility rate cases is to be arrived at by taking the original cost or the prudent investment of the property with appropriate consideration for accrued depreciation. We have not sought a revaluation of the Company's property in the sense that it is necessary for the Commission or the Company to make reproduction cost appraisals. All we have said is that it should be necessary in determining the need of the company for a rate increase for the Commission to determine whether it would be unfair to limit the Company's return to original cost with due consideration to the proper treatment of depreciation in line with the Supreme Court's decisions."

In its essence, the question raised in this aspect of the case is whether the Commission, as the regulatory body, or the Price Administrator, as intervenor, should control the scope of the investigation. We do not think that the mere right to intervene in a rate proceeding conferred upon the Price Administrator by the Act of October 2, 1942, includes the power to compel the regulatory body to undertake a complete rate investigation against its better judgment, much less an investigation upon lines contrary to the governing statute. The power and authority to fix reasonable, fair and just rates for utilities in the District of Columbia was conferred by Congress upon the Commission, District Code Title 43-401. To this end the Commission is empowered to make rules and regulations for the administration of the Act, for audits and investigations, and for the conduct of its own proceedings and hearings. Title 43-202, 43-402. It may, in its discretion, proceed with or without notice upon its own initiative or upon reasonable complaint "to make such investigation as it may deem necessary or convenient". Title 43-408. The Act is carefully drawn in considerable detail and expressly provides that it shall be interpreted and construed liberally in order to accomplish the purposes thereof. Title 43-1003.

It is not reasonable to suppose that Congress intended to abrogate or repeal the powers so carefully elaborated by giving the Price Administrator the right to compel a complete overhauling of the established practice of the Commission and the adoption of a new and different standard, when experience had shown that the prevailing practice was adequate to secure the objective of adequate service with a fair rate of return on the utility's investment. The power to fix rates is a legislative power which has been delegated by Congress to the Commission and in its exercise within constitutional limits the discretion of the Commission may not be controlled even by the courts. The utility itself cannot compel an investigation and a change of rate that is not confiscatory in the constitutional sense. Nor can the rate making body be confined to any particular standard or method in the field of its discretion. That which was said of the Federal Power Commission in Power Comm'n. v. Pipeline Co., 315 U. S. 575, 586, is equally true of the Public Utilities Commission of the District of Columbia. The court said:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

It must be borne in mind that there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates. On the contrary the Commission expressed a desire to hear the Price Administrator and urged him to present any evidence in his possession on this point. Moreover, the Commission gave heed to present day conditions by reducing the allowance which the sliding scale would have justified and at the same time ordered a small increase in rates in order to buttress the financial condition of the Company and enable it to satisfy the abnormal demands upon it. The conflict arose when the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body.

The investigation leading to the adoption of the sliding scale in 1935 required three and a half years for its completion and cost $750,000; and it is obvious that the kind of inquiry that the Price Administrator now demands could not be made without great expense of time and money. Our conclusion is that the refusal of the Commission to undertake such an investigation at this time, and in the meantime to ignore the reasonable needs of the company, was not arbitrary or illegal, but was well within its lawful discretion.

The judgment of the District Court will be reversed and the cases remanded with instructions to dismiss the appeals from the Commission's orders.

Reversed and Remanded.

MILLER, *Associate Justice, dissenting:* I think the decree of the District Court should be affirmed. The decision of this case does not turn upon the power of courts to interfere with the findings and determination of regulatory bodies, or upon the findings and determinations made by the Commission in the present case. The questions are (1) whether full intervention was permitted and a fair hearing given within the meaning of the applicable statute; (2) whether a rate increase was made contrary to the requirement of the statute.

Making full allowance for the fact that the Inflation Control Act of October 2, 1942,[1] represented a compromise between contending

[1] 56 Stat. ——, 50 U. S. C. A. (App.) Sec. 961 *et seq.*

factions in Congress—as most legislation does—nevertheless some substantial purpose must have been intended to be served by inclusion therein of the provision "That no common carrier or other public utility *shall make any general increase* in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction *to consider such increase.*"[2] [Italics supplied]

In the first place, this proviso clearly defines the issue which is to be tried by the authority having jurisdiction of the case in which intervention is required, namely, whether or not the public utility "shall make any general increase in its rates." The issue is not whether an increase shall be made pursuant to an arrangement theretofore agreed upon, or upon notice theretofore given, or upon terms theretofore defined, or in such an investigation as may be deemed "necessary or convenient" by the authority. The issue is simply and plainly, *shall an increase be made.* The trial of no lesser issue, however arrived at, can satisfy the requirement of the statute. Limiting the Administrator's intervention to the application of a sliding-scale formula previously adopted, therefore, defeated the purpose of the Act.

It is the duty of courts in interpreting statutes to avoid absurd results. Whatever may have been said in explanation of an act, its plain language cannot be disregarded. To limit the effect of the present Act to "the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation," would reduce it to an absurdity. It is a matter of common knowledge that increases in rates tend to increase the cost of living. The Commission might well be expected to take notice of the fact. Intervention and fair hearing would not be necessary to make such a showing. If no more had been intended by the Act it could have been so indicated therein without requirement of notice or intervention.

Neither is the only alternative to such a purposeless intervention, "the power to *participate in the decision* or to *control the proceeding.*" It is reasonable to suppose that Congress intended an intervention of the usual character. Intervention in a trial court does not contemplate participation in the decision; neither does it give to the intervenor power to control the proceeding. But it does contemplate that the court may be required to try the issues contemplated by the applicable laws; it empowers an intervenor, just as any other party, to insist upon compliance with the law and to challenge, in an appellate court, the failure of the trial court to do so. No less was intended here.[3]

Considerable reliance is placed upon the provisions of the District Code defining the powers of the Commission. It is argued that experience has shown the prevailing practices of the Commission to be adequate to secure proper service and a fair rate of return, hence that it is not reasonable to suppose Congress intended to limit the powers originally conferred upon the Commission; especially as re-

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[2] 56 Stat. ——, 50 U. S. C. A. (App.) Sec. 961.

[3] *Cf.* Federal Communications Commission v. National Broadcasting Co., decided May 17, 1943, 11 U. S. Law Week 4385.

peal by implication is not favored. In *Henderson* v. *Washington, Marlboro & Annapolis Motor Lines, Inc.*,[4] this Court said, concerning the Inflation Control Act of October 2, 1942: "But, apart from all statutes existing prior to October 2, 1942, and all orders, rules and regulations made pursuant to those statutes, the Act of October 2, 1942, is conclusive of the issue presented for our decision. As it was enacted subsequent to the Interstate Commerce Act it supersedes that Act, to whatever extent may be necessary to achieve its own purposes. Its clearly expressed purpose was to stabilize prices, wages and salaries affecting the cost of living, upon the basis of the levels which existed on September 15, 1942." This language is equally applicable in the present case. On June 9, 1943, Judge Sibley, speaking for the Fifth Circuit Court of Appeals,[5] held that Section 265 of the Judicial Code, forbidding the grant of an injunction by a court of the United States to stay proceedings in a state court must be considered modified by the later provisions of the Emergency Price Control Act. The present case involves much less difficulty. The Commission is a creature of Congress; its powers are derived from legislation enacted by Congress; there is no question of policy to be surmounted, in interpreting the earlier statutes in such manner as to secure their conformance to the purposes of later acts. While repeals by implication are not favored, repeals by implication do occur. When, as here, a new law is designed to achieve a clear purpose, it must be respected; and inconsistent procedures, previously existing must be disregarded. Consequently the rules adopted by the Commission governing its procedure and the shaping of issues have no vitality as against the requirement of the Act of October 2, 1942, that intervention must be permitted, or against any legal implications which flow from that requirement. From then on, it is not a question of the Commission or the Price Administrator controlling the proceedings. It is the *law* which controls the proceedings and if the Commission does not comply with the law, the Price Administrator's duty is to challenge its failure to comply; and ours to uphold the challenge.

Neither is it material to the decision of this case that the Commission *reduced the allowance* which the sliding scale would have justified. The important fact is that the Commission *allowed an increase of rates*. If that allowance was made without granting full intervention and a fair hearing within the meaning of the applicable statute then the action of the Commission was improper and the decision of the District Court should be affirmed. With all deference to the majority, there *was* a refusal by the Commission to permit full intervention and to receive evidence with regard to the inflationary effect of an increase in rates. Only to the extent that offered evidence assumed the validity and unimpeachability of the sliding-scale arrangement, would the Commission receive it. Upon the same theory the Commission denied the Administrator's request to examine the Company's books and records. And upon the same theory the Commission refused to permit inquiry concerning the validity of the basic assumptions of the sliding-scale arrangement.

An argument of convenience is made upon the theory that compliance with the Administrator's demand for intervention and hear-

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[4] 132 F. (2d) 729, 732, cert. denied April 5, 1943, —— U. S. ——.

[5] Henderson (Brown) v. Fleckinger, 5 Cir., —— F. (2d) ——, 11 U. S. Law Week 2879.

ing would have required "a complete rate investigation," "a survey of the entire field," "the laborious calculation and studies that a thorough rate investigation necessarily entailed," "a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body". Attention is called in this connection to the fact that the investigation leading to the adoption of the sliding scale in 1935 required three and a half years for its completion and cost $750,000. It is asserted that the kind of inquiry that the Administrator now demands could not be made without great expense of time and money. I do not so read the record. What the Administrator asked was merely a reconsideration of the *basic principles* of the sliding-scale arrangement in the light of present economic conditions and the Government's program to prevent inflation; namely, what is a proper rate base; what are fair and proper operating expenses; what account should be taken of depreciation; what are proper income taxes to be allowed; what is a fair rate of return for the Company in the light of current economic conditions? There was no suggestion that the great mass of information gathered prior to 1935 was not equally available for present purposes. There was no objection to the introduction by the Commission of other available material in its files, just as is done by the Interstate Commerce Commission and by other regulatory authorities.

It is significant in this respect that the Commission, itself, went back of the sliding-scale arrangement in its allowance of an increase of rates. If, as is contended, an inquiry into the basic principles of a sliding-scale arrangement necessarily requires a three year investigation, at a cost of $750,000, how does the Commission explain its disregard of the sliding-scale arrangement in allowing accruals for income taxes at the rate of 31 per cent, although the sliding scale provided for an allowance of 40 per cent? Some basic principle of the arrangement must have been violated by that action. In short, my conclusion is that this argument about a large scale, expensive, time-consuming investigation, was advanced by the Commission and supported by the Company as camouflage to hide their unwillingness to permit *any* inquiry which did not assume and admit the infallibility of the sliding-scale arrangement. And I conclude that, whatever the proper limits of inquiry may have been, the Commission fell far short of them in the present case. The Commission and the Company apparently assume that only two alternatives were open (1) to proceed as the Commission specified in its original order of March, or (2) to enlarge the proceeding to permit a complete reinvestigation of every element, of fact as well as of principle, involved in the original sliding-scale arrangement. There were, instead, at least two other alternatives, (1) to permit no increase in rates until the war is over, as a matter of policy; (2) to permit the Price Administrator to present such evidence as he deemed proper[6] concerning any phase of the matter; then, in deciding the case, to use, if the Commission pleased, the records of the earlier investigation, the sliding-scale arrangement and other of its pertinent records, compiled by its experts—and properly introduced as evidence. This could probably have been easily

[6] In the *Henderson* case, 132 F. (2d) 729, 732, we said: "... the new Act ... permits timely intervention by the Price Administrator ... followed by such appropriate showing as he may wish to make."

done in the time which was actually consumed, at the hearing, in contending over the scope of the intervention and the issues to be tried. In any event, I agree with the District Court that: "The sliding scale arrangement is not a contract, certainly not one which binds the public. It must give way to public policy and to Congressional enactment which expresses that policy. ...it must now be subjected to a test not previously required."

It is suggested that the increase in rates, granted by the Commission in the present case, is very small, both in total and in their effect upon individual consumers. It is argued also that utility rates are not exposed to "speculative, unwarranted and abnormal increases," hence that Congress did not intend to apply to the guidance of regulatory authorities the wartime standards of the Inflation Control Act. I cannot follow this reasoning. Because Congress chose to retain *regulation* in authorities already existing, rather than placing it in the hands of the President, cannot explain away the fact that such rates were brought within the compass of the Act. There is no reason why the *standards* applicable in the one case should be inapplicable in the other. So far as concerns the minimal character of the rate increases I am content to adopt the language of Judge Vinson in the case of *Lincoln Savings Bank of Brooklyn* v. *Prentiss M. Brown* (decided May 7, 1943) when speaking for the United States Emergency Court of Appeals, concerning the contention that the Price Act contemplated regulation only of those commodities, the prices of which substantially affect the cost of living, he said: "It is true that an increase in complainant's prices, in and of itself, does not substantially affect living costs. Complainant's statement is correct, so far as it goes, but it is deceptive in its intended inference that, for that reason, no purpose is served by the regulation of safe deposit rental rates. Accession to this type of reasoning would virtually destroy the effectiveness of the Act. Complainant's argument is applicable to thousands of commodities besides its own. Clearly, however, *the collective effect of so many increased prices could create the very chaotic condition that the Act was designed to prevent.* It is plain to us that there is compelling reason to restrain the complainant and others in its class from making their *individually inappreciable contributions* to what would result in a very appreciable total." [Italics supplied]

The Administrator suggests the following possible construction of the proviso to the second sentence of Section 1 of the Inflation Control Act: (1) "And such regulatory authority, in determining whether to grant or deny the increase, may give such effect, if any, to the national stabilization program as it may deem appropriate;" (2) "And such regulatory authority, in determining whether to grant or deny the increase, shall give effect to the national stabilization program;" (3) "And such regulatory authority, in determining whether to grant or deny the increase, shall grant the increase only if, and to the extent, it finds the increase necessary to aid in the effective prosecution of the war or to correct gross inequities." I agree with the Administrator that the third suggested construction is correct. The monopoly character of public utilities; the absolute dependence of the people upon them for service; the complicated structure of their holdings and their financing; these and other similar considerations are the very ones which caused the development of great

federal, state and local regulatory agencies. It is because such agencies are well equipped to supervise and regulate, that Congress decided to preserve their control, rather than to throw a greatly increased burden upon war-time, emergency agencies such as the Price Administrator. But that decision does not by any means require the conclusion that these regulatory agencies were not to consider the existence of a war-emergency or apply the war-time standards which are implicit in the Act of October 2, 1942. It was, undoubtedly, the duty of the Commission to consider the financial condition of the Company, its ability to serve the Washington area, and its ability to refinance itself. It is, also, undoubtedly the duty of the President, the Price Administrator and other appropriate governmental agencies to consider the financial condition of other industries, of agricultural interests, of wage earners and of men selected for military service. The exigencies of war make it necessary, however, to impose controls which would not be proper during peace time.

When young men are giving their lives by thousands, when the normal economy has given way to the necessities of war, when industrial organizations, great and small, have been converted to war production or perhaps destroyed,[7] it seems to me that a curious lack of identification with our national emergency and our national effort is required, to continue speaking in terms of normal arrangements and peace-time formulae. It is true, as the history of this legislation shows, that it is a compromise. But the significant thing is that the disputed proviso was incorporated, at all, into the Act of October 2, 1942. If the intention of Congress had been to leave regulation of the utilities by existing agencies solely according to pre-war standards, it was not necessary to say anything about them in this Act. Of course it is possible to find language in legislative history which will support either side of a bitterly contested issue upon which a compromise is finally reached. Perhaps each proponent and opponent hopes that when the courts come to interpret their compromise language, the interpretation will fall his way. As previously stated, however, our task is to read the Act in such manner as to avoid an absurd result and to give it meaning, in the light of its expressed over-all purpose. There can be no doubt of that purpose in the present case. It was certainly not the intention of the lawmakers to leave these regulatory bodies, or the utilities, free of concern for the war-time welfare of the Country, to do business "as usual" according to such sliding-scale arrangements, designed for peace-time, depression-ridden Washington, as are involved in the present case.

The Commission's order of October 13, 1942, specified that the new, increased rates became effective on *September 1, 1942*, under the terms of the sliding-scale arrangement. On October 14, the Company gave notice to the Price Administrator, but in that notice specified that the effective date of the increase was *September 1, 1942*; in its order of October 23, 1942, the Commission specified again that the effective date of the increased rates was *September 1, 1942*, and it permitted intervention for the receipt of evidence concerning the increase in rates authorized by its order of October 13, 1942; on October 30, 1942,

[7] See for an example of such possibilities, Perkins v. Lukens Steel Co., 310 U. S. 113, and Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. (2d) 627.

the Company consented to intervention; in its order of November 9, 1942, the Commission recited that intervention had been permitted for the purpose of receiving evidence bearing on the increase authorized by its order of October 13; on November 16, 1942, it denied the Administrator's petition for reconsideration. On the record of the Commission, therefore, its order of October 13, 1942, still stands; the increase in rates is effective as of September 1, 1942. The Act provides that no increase in rates which were in effect on September 15, 1942, shall be made unless the utility, "*first* gives thirty days notice ... and consents to the timely intervention. . . ." [Italics supplied] In my opinion the increase, made in this case, was in clear violation of the law, entirely apart from the merits of the case.

A study of the record, particularly as interpreted in the opinion of Commissioner Hankin, suggests that when the time comes to consider the case on the merits, some of the findings and conclusions of the Commission will not stand careful scrutiny. But those questions are not before us. The decree of the District Court is clearly correct, on questions of procedure alone, and should be affirmed.

United States Court of Appeals for the District of Columbia

April Term 1943

[Filed July 26, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION &c., APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Appeals From the District Court of the United States for the District of Columbia

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in these causes be, and the same is hereby, reversed, and that these causes be, and they are hereby, remanded to said District Court with instructions to dismiss the appeals from the Commission's orders.

Per Mr. Chief Justice Groner.

July 26, 1943.

Dissenting opinion by Mr. Justice Miller.

United States Court of Appeals for the District of Columbia

April Term, 1943

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

JAMES F. BYRNES, DIRECTOR OF ECONOMIC STABILIZATION BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Order

On consideration of motion of Fred M. Vinson as Economic Stabilization Director to be substituted as party appellee herein in the place and stead of James F. Byrnes, Director of Economic Stabilization, resigned, it is ordered by the court that Fred M. Vinson, as Director of Economic Stabilization, be, and he is hereby, substituted in No. 8501 and in No. 8502 as party appellee in the place and stead of James F. Byrnes, Director of Economic Stabilization, resigned.

Dated August 11, 1943.

Per curiam.

United States Court of Appeals for the District of Columbia
[Filed Sept. 9, 1943. Joseph W. Stewart, clerk.]

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

Designation of record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendices to briefs of the parties.
2. Minute entry of argument.
3. Opinion.
4. Judgment.

5. Order of substitution of party appellee. (Authority of Mr. Booth).
6. This designation.
7. Clerk's certificate.

FRED M. VINSON,
Director, Office of Economic Stabilization,
PRENTISS M. BROWN,
Administrator, Office of Price Administration.
By GEORGE J. BURKE,
George J. Burke,
General Counsel,
DAVID F. CAVERS,
David F. Cavers,
Assistant General Counsel,
HARRY R. BOOTH,
Harry R. Booth,
Utilities Counsel,
Legal Department, Office of Price Administration.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing Designation of Record on each of the following:

E. Barrett Prettyman, Esq., 822 Connecticut Avenue N.W., Washington, D. C. Attorney for the Washington Gas Light Company.

Richmond B. Keech, Corporation Counsel and Lloyd B. Harrison, Assistant Corporation Counsel, District Building, Washington, D. C. Attorneys for the Public Utilities Commission.

by mailing a copy thereof addressed to each such party.

HARRY R. BOOTH,
Attorney for Appellees.

Dated at Washington, D. C., this 8th day of September 1943.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 451, both inclusive, constitute a true copy of the appendices to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellees in the cases of:

No. 8501

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, &c., APPELLEE

No. 8502

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, &c., APPELLEE

No. 8503

WASHINGTON GAS LIGHT COMPANY, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

No. 8504

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

April Term, 1943, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this fourteenth day of September, A. D. 1943.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals,
for the District of Columbia.
By C. PRESTON GAINOR,
Assistant Clerk.

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In the Supreme Court of the United States

October Term, 1943

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the purpose of the Petition for a Writ of Certiorari, the printed record may consist of the following:

1. Volume I, Appendix to briefs of respondents in the United States Court of Appeals for the District of Columbia.

2. Volume II, Appendix to briefs of petitioners in the United States Court of Appeals for the District of Columbia, together with proceedings had in that court.

It is further stipulated that any of the parties may refer in petition and briefs to the original transcript of record filed in this Court, and that if the petition for certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the original transcript of record as the parties may designate.

CHARLES FAHY,
Solicitor General, Counsel for Petitioners.

Dated this 10th day of September 1943.

LLOYD B. HARRISON,
E. BARRETT PRETTYMAN,
Counsel for Respondents.

Dated this 13th day of September 1943.

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In Supreme Court of the United States

Stipulation as to record

Filed Nov. 26, 1943

It is hereby stipulated and agreed by and between the attorneys for the above named parties that the record filed in this Court with the petition for certiorari may be used in the hearing of this case on the merits and that no further printing is necessary. It is further stipulated that any of the parties may refer in briefs and argument to the original transcript of record filed in this Court.

CHARLES FAHY,
Solicitor General,
Counsel for Petitioners.
E. BARRETT PRETTYMAN,
LLOYD B. HARRISON,
Counsel for Respondents.

Dated this 26th day of November 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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In the Supreme Court of the United States

October Term, 1943

No. —

Fred M. Vinson, Director of Economic Stabilization, by Prentiss M. Brown, Administrator, Office of Price Administration, petitioner

v.

Washington Gas Light Company, respondent

No. —

Fred M. Vinson, Director of Economic Stabilization, by Prentiss M Brown, Administrator, Office of Price Administration, petitioner

v.

Public Utilities Commission of the District of Columbia, respondent

---

No. —

Prentiss M. Brown, Administrator, Office of Price Administration, petitioner

v.

Washington Gas Light Company, respondent

No. —

Prentiss M. Brown, Administrator, Office of Price Administration, petitioner

v.

Public Utilities Commission of the District of Columbia, respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General on behalf of the Economic Stabilization Director and the Administrator of the Office of Price Administration prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered on July 26, 1943, in the cases of *Washington Gas Light Company* v. *Byrnes, etc., Washington Gas Light Company* v. *Brown, etc., Public Utilities Commission of the District of Columbia* v. *Byrnes, etc., Public Utilities Commission of the District of Columbia* v. *Brown, etc.*, reversing the judgment of the District Court and remanding the cases with instructions to dismiss the appeals from the Commission's orders.

OPINIONS BELOW

The opinions in the Court of Appeals for the District of Columbia are not yet officially reported but may be found at R. II, 428–449. The opinion of the district court (R. I, 15–20) is reported in 48 F. Supp. 703. The opinion of the Public Utilities Commission of the District of Columbia accompanying its Order No. 2401 of October 13, 1942, granting a rate increase, is found at R. I, 39–57; the dissenting opinion is found at R. II, 271–317.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on July 26, 1943

(R. II, 451). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, and Section 43–705 of the District of Columbia Code (1940), being part of the Act of March 4, 1913, 37 Stat. 979, as amended.

QUESTIONS PRESENTED

1. Whether the Commission failed to accord the Director and the Administrator their right to a full and fair hearing under the Act of October 2, 1942.

2. Whether the Commission was under a duty, by virtue of its statutory responsibility to establish just and reasonable rates, and in view of the wartime economy and the national stabilization program, to refuse to grant a rate increase in the absence of a clear showing that an increase was necessary.

3. Whether the Commission was under such a duty by virtue of the Act of October 2, 1942.

4. Whether the company, which on its own figures was earning a return of 5 per cent on a substantially undepreciated rate base after all Federal income and excess profits taxes, may be held to have made a clear showing that an increase in its rates was necessary.

5. Whether the Commission erred in its treatment of various items of expense, especially (a) the allowance as an operating expense of certain wartime corporate income taxes; and (b) the allowance of depreciation expense on a basis con-

flicting with that approved in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575.

STATUTES AND ORDERS INVOLVED

Section 1 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), Supp. II, Sections 961, 962, 967 (c):

> That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.* [Italics added.]

All other pertinent statutes and orders are set forth in the Appendix, *infra*, pp. 22–29.

STATEMENT

On March 20, 1942, the Public Utilities Commission of the District of Columbia (the "Commission") issued Order No. 2219 directing that "an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding-scale arrangement" (R. I, 33). On July 21, 1942, the Commission issued a notice under such order for a formal public hearing "in accordance with the sliding scale arrangement established by Order No. 1458" (R. I, 34, 69–73). Hearings were held before the Commission on several days during August and September. At the first hearing a petition of the Administrator of the Office of Price Administration (the "Administrator") for leave to intervene was filed, and without objection, was granted. (R. I, 34–37.)

During the hearings, counsel for the Administrator repeatedly moved that the basic provisions of the sliding-scale arrangement be reexamined in the light of the price control legislation and, if necessary, that the scope of the proceedings be broadened to permit such inquiry. All such motions were denied, on the ground that the issues were limited to the carrying out of the sliding-

scale formula established in 1935. The Chairman on September 8 stated that questions pertaining to the basic elements of that arrangement were not within the scope of the proceeding (R. I, 121–123).[1]

By oral and written motions (R. II, 345–346) the Administrator sought to reopen the proceeding for the purpose of taking evidence with respect to the necessity of revising the sliding-scale arrangement to take account of present economic conditions, "particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction." The motions were denied by a two-to-one decision of the Commission (R. II, 409).

Thereafter, the Act of October 2, 1942 (*supra*, p. 4; Appendix, *infra*, p. 23), was approved, providing, *inter alia*, for thirty days' notice of utility rate increases to, and consent to intervention by, the President or his agent. October 3, 1942, the President issued Executive Order No. 9250 estab-

[1] On this ground the Commission sustained the Company's objection to a question relating to the Company's depreciation expense charged for income-tax purposes (Tr. 976) and sustained the Company's objections to questions concerning the propriety of the arrangement's provisions for depreciation R. II. 390–396). These latter questions were directed to the propriety of computing interest at 4 percent on the reserve balance while the rate of return was computed at the higher rate of 6½ percent (see also R. II, 400 *et seq.*).

The Commission indeed refused to permit one of the Commissioners to ask questions pertaining to the rate base (R. I. 96–97).

lishing the Office of Economic Stabilization. 7 Fed. Reg. 7871.

On October 13, 1942, prior to notice to the Economic Stabilization Director (the "Director"), the Commission issued Order No. 2401 approving an increase in gas rates aggregating approximately $200,000, effective September 1, 1942 (R. I, 39–57). One Commissioner dissented (R. II, 271–317).[2] Two days later, the Company served the Director with notice, which did not embody a consent to intervention as required by the Act of October 2, 1942 (R. I, 188–189, 191). The Director, on October 14, 1942, by his Directive No. 1, designated the Administrator as his representative to receive such notice and to intervene and participate in proceedings upon proposals to increase rates or charges. 7 Fed. Reg. 8758.

On October 19, 1942, the Director, by his representative, filed a petition with the Commission praying that Order No. 2401 be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the Director be permitted to intervene and to file a brief in such reopened proceedings (R. I, 57–60). The Commission on October 23, 1942, issued Order No. 2404, which reopened the record "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization,

[2] The dissenting Commissioner concluded that the record justified a large rate reduction (R. II, 316–317).

additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401," and intervention was "granted for such purpose" (R. I, 60–63). This order, from the limitations of which one Commissioner dissented (R. II, 317), fixed November 2, 1942, as the date for the further hearing. On October 30, 1942, the Company finally consented to intervention by the Director (R. I, 191).

A further petition was thereafter filed on behalf of the Director on October 31, 1942, which alleged, *inter alia*, that Order No. 2404 unnecessarily restricted the Director's right of intervention and improperly limited the type of evidence which the Commission would receive. It further pointed out that in Order No. 2404 the Commission failed either to grant or to deny the prayer of the earlier petition to vacate Order No. 2401 (R. I, 63–65). This petition was denied by an oral ruling of the Commission on November 2, 1942 (R. I, 214–215). One Commissioner dissented from this ruling in a comprehensive opinion (R. II, 322–336).

Hearings were held on November 2 and 4, 1942, devoted chiefly to an effort to secure the withdrawal of the limitations imposed by Order No. 2404. On November 9, 1942, the Commission issued Order No. 2418 denying the petition that Order No. 2401 be vacated, one Commissioner renewing his dissent. (R. I, 66–67.) Petitions for reconsideration were filed on November 12, 1942,

on behalf of the Director and the Administrator, setting forth in detail errors in the Commission's procedural rulings and in its determination of just and reasonable rates (R. II, 336–338, 346–353). Both petitions were denied on November 16, 1942, by Commission Orders Nos. 2422 and 2423, one Commissioner dissenting (R. II, 338–339, 353).

On appeal by the Director and Administrator the district court held that the action of the Commission was "arbitrary and illegal" and that the Commission's Order No. 2401 should be vacated (R. I, 15–21). The court ruled that the "right conferred upon the President and his representatives was not a mere formality" (R. I, 19), and that "the basic principles of the [sliding-scale] arrangement and other factors which inhere in the question of inflation and of fairness and justice are open for determination" (R. I, 20).

The company and the Commission appealed to the court of appeals. The case was there reargued, because of the resignation of Mr. Justice Vinson. The Court of Appeals, with one Justice dissenting, upheld the action of the Commission, reversed the judgment of the district court and remanded the case with directions to dismiss the appeals from the Commission's order.

REASONS FOR GRANTING THE WRIT

1. While the order of the District of Columbia Public Utilities Commission, from which this litigation arises, imposes a rate increase of no

more than $200,000 upon the users of gas in the District of Columbia, the legal issues posed by the case are of grave importance to the national stabilization program. Fundamentally, they raise the question whether a regulatory authority having jurisdiction over common carrier or other public utility rates is free to approve an increase in any such rate whenever the increase could be found just and reasonable if measured by peacetime criteria, or whether, instead, the regulatory authority is under a legal duty—imposed by its own statute and by the Act of October 2, 1942, *supra*, p. 4, as well—to deny every rate increase as inflationary and therefore as unjust and unreasonable in the absence of a clear showing that the increase is necessary.

The Administrator's duties under the Act of October 2, 1942, call for his appearance in numerous rate increase proceedings before Federal, state and local regulatory agencies throughout the nation. He must also make administrative determinations whether to oppose or to acquiesce in a great volume of proposed rate increases of which he receives notice under the Act of October 2.[3] Both petitioner and the regulatory agen-

[3] Over 7,500 notices of proposed rate increases (chiefly from carriers) have been received under the Act of October 2. Procedural Regulation No. 11, issued by petitioner, prescribes the form of notices and requires that they be accompanied by data needed in deciding whether to oppose the increase. 7 Fed. Reg. 939. It is estimated that the total annual

cies which pass upon rate increases need the guidance of an authoritative statement on the issues raised by this case.[4]

2. The Commission failed to accord petitioners the full and fair hearing to which the Act of October 2 entitled them. Both courts below agreed that the Act of October 2 assured the President's representative a full and fair hearing. Yet the illusory character which this privilege will have if the court of appeals' decision goes unreviewed is revealed by the following actions of the Commission which the majority of that court deemed compatible with a full and fair hearing:

(a) The Commission ruled that the scope of the hearing was restricted by the antecedent sliding-scale arrangement which provided for automatic escalation of the rates if their yield were shown to have fallen below a specified level.

(b) The Commission refused to reconsider the rate of return provisions in the sliding-scale arrangement, and therefore could not determine what rate of return was adequate in view of the stabilization program (R. I, 121–123; II, 345–353, 409).

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payments for gas, electric, telephone, street and steam railway and other utility and common carrier services exceeds 13 billion dollars.

[4] The administrative uncertainty left by the decision is heightened by the fact that the lower tribunals have been in sharp disagreement; the Commission decided two to one against petitioners, the district court sustained petitioners, and the court of appeals decided two to one against them.

(c) The Commission refused to consider the propriety, in determining depreciation expense, of its calculation of interest at only 4 percent on the depreciation reserve, whereas the basic rate of return allowed under the arrangement is 6½ percent and the actual rate of return is at least 5 percent.[5] Cross-examination on this question of depreciation expense was not permitted (R. II, 390–396). Yet the Commission's action appears to disregard the reasoning in this Court's opinion in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 595–596. See also paragraph 16 of section 8 of the Act of March 4, 1913, *infra*, p. 27, and R. II, 315–316.

(d) The Commission rejected petitioners' request, directed to show that no hardship was being imposed on the Company, that the Commission consider data (already in the Commission's records) which indicated that the rate base was in excess of the original investment (R. I, 207). Like the other efforts of petitioner in the proceedings, this would not have involved a protracted rate hearing; no full-scale valuation hearing was suggested or contemplated.

(e) The Commission's order of October 13 increasing the rates *as of September 1, 1942* (R. I, 54), was issued before the Company gave petitioner the statutory 30 days' notice. After refusing to vacate this order, the Commission au-

[5] See note 10, page 20, *infra*.

thorized petitioner to appear only for the purpose of showing the "inflationary effect, if any," of the increase, an authorization which, in view of the Commission's persistent refusal to consider the relevant factors going to the necessity and reasonableness of the increase, was meaningless (Cf. R. II, 333–335, 444).

3. The freedom which normally is accorded a regulatory authority "to make the pragmatic arrangements called for by particular circumstances," which was invoked by the Court of Appeals, could not relieve the Commission from the duty of according petitioner a full and fair hearing, whether the source of that duty lay in Constitution or statute. Cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586. The rights of which petitioner was deprived were substantial, and absolution for the Commission's errors cannot be found in an exercise of administrative discretion. Cf. *Atchison, T & S. F. R.* v. *United States*, 284 U. S. 248.

Under its own statute the Commission is required to prescribe just and reasonable rates (Appendix, *infra*, p. 24). Changes in economic conditions contract, as well as expand, the range of administrative discretion under an authority to establish just and reasonable rates. We maintain that in a wartime economy where there is constant, pervasive pressure on prices, wages, and rates to rise, effective stabilization is possible only if *all* increases are denied to the beneficiaries of stabili-

zation which they do not clearly show to be necessary. If that position is sound, then we submit that no unnecessary increase in rates can, as a matter of law, be held just and reasonable.[6]

The Commission's duty in this regard was reenforced by the Act of October 2. The notice-and-intervention procedure was established by Congress as part of a comprehensive stabilization program in which the Commission and other regulatory agencies were entrusted with the stabilization of common carrier and other public utility rates. Concededly the petitioners were entitled to intervene and to appeal by virtue of this Act (see 88 Cong. Rec. 7973–74; R. II, 435). But it was not the intention of the lawmakers that these privileges be mere formalities. While, to be sure, Congress declined to approve a provision which the Senate had passed giving the President a veto power over all rate increases, "It was certainly not the intention of the lawmakers to leave these regulatory bodies, or the utilities, free of concern for

[6] It has not been practicable in this petition to elaborate the criteria of necessity. However, we have found no broad formulation of these criteria more satisfactory than that contained in Section 1 of the October Act itself, namely, "necessary to aid in the effective prosecution of the war or to correct gross inequities." Applied with a view to the needs of the industry and to constitutional limitations, these standards give apt direction to administrative judgment while imposing a salutary restraint upon its exercise.

the wartime welfare of the Country, to do business 'as usual' . . ." (R. II, 448).[7]

Preoccupation with an antecedent formula cannot form the measure of the Commission's duties. This Court has had occasion recently to observe, "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S. S. Co.* v. *National Labor Relations Board,* 316 U. S. 31, 47. The fact that the District of Columbia statutes in their standard of reasonableness follow

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[7] This position is not affected by Section 302 (c) (2) in the Emergency Price Control Act of 1942, which states that "Nothing in this Act shall be construed to authorize the regulation of * * ** rates charged by any common carrier or other public utility." It has been argued that the failure to give the President power, under the Act of October 2, to suspend that immunizing provision and the preservation, by Section 7 (c) of the October Act, of the unsuspended provisions of the original Act shows clearly a congressional intent not to subject utility rates to regulation under the Price Control Act. This must be granted. But the Price Administrator, as intervenor under the October Act, does not purport to regulate utility rates. If, as we contend, a substantive duty is imposed on regulatory authorities by the October Act, it is a duty imposed by that Act and not by the Price Control Act or by the Price Administrator. A power to suspend Section 302 (c) (2) of the Price Control Act would have been of no use whatsoever to the President acting in accordance with the intervention procedure.

a familiar pattern of Federal and state legislation assures that the decision of this Court will not be localized in effect. Cf. *American Medical Ass'n* v. *United States*, 317 U. S. 519.

4. To the extent that the Commission sought to reconcile its action with the dictates of the stabilization legislation, the considerations advanced are inadequate and in themselves raise questions of importance.

The Commission reasoned that the increase was a very little one and hence would have no "material inflationary tendencies" (R. I, 54). The disastrous effects of this notion on stabilization, if allowed to become prevalent among regulatory authorities, were vividly stated by Chief Judge Vinson of the Emergency Court of Appeals in *Lincoln Savings Bank* v. *Brown*, decided May 7, 1943:

> It is true that an increase in complainant's prices, in and of itself, does not substantially affect living costs. Complainant's statement is correct, so far as it goes, but it is deceptive in its intended inference that, for that reason, no purpose is served by the regulation of safe deposit rental rates. Accession to this type of reasoning would virtually destroy the effectiveness of the Act. Complainant's argument is applicable to thousands of commodities besides its own. Clearly, however, the collective effect of so many increased prices could create the very chaotic condition that

> the Act was designed to prevent. It is plain to us that there is compelling reason to restrain the complainant and others in its class from making their individually inappreciable contributions to what would result in a very appreciable total.

The Commission did not allow the company to treat excess profits taxes and corporate income taxes above 31 percent as operating expenses (R. I, 48). This action, of course, we approve; but we believe that the Commission was under a duty to disallow all income taxes above those levied at peacetime rates.[8] This question is of lively importance today. The allowance of the additional extraordinary defense and wartime income taxes as operating expenses, to be borne by the rate payers, threatens a dangerous inflationary spiral. The case of *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, has left regulatory bodies uncertain as to the scope of their powers where wartime taxes are involved, at least when confiscation is not an issue. In any event, the Commission's action in disallowing excess profits taxes served only to reduce the size of the unnecessary rate increase which it should have prevented entirely.

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[8] A different treatment of wartime taxes may be justified where appropriate adjustment for wartime conditions is made in the permitted rate of return. There would of course be no justification for an increase here since the company was earning at least 5 percent after all income and excess profits taxes.

The Commission asserts that adherence to the sliding-scale arrangement, with the consequent rate increase, was necessary to maintain the Company's credit position and to enable it to secure funds for necessary additional facilities. There exists no simpler way to relax the restrictions of stabilization than by finding that price increases are needed to increase production—or, to use the present variant, that rate increases are needed to maintain credit and enlarge facilities. The danger lies in the fact that, although the principle is valid, evidence of convenience and expediency is easily substituted for proof of compliance with the rigorous standard of necessity. The hazard is exemplified by the Commission's action in the present case.

Seemingly, the Commission was moved to its assertion by two facts: the temporary failure of the Company to dispose of all of an issue of preferred stock and the temporary recession in the Company's net revenues after all taxes. But the Commission itself ascribed the failure of the stock issue to "depressed market conditions" (R. I, 50–51) and, since it occurred several months before the rate proceedings, when the market was near its post-Pearl Harbor nadir, fear for the "integrity" of the sliding-scale arrangement (R. I, 51) could not have caused the Company's short-lived set-back.[9] Had the Commission under-

[9] The balance of the issue was sold *after* the decree of the district court setting aside the order. The Company also sold $1,700,000 3¾% bonds last winter and spring.

taken to determine whether a rate increase was necessary to permit needed financing, surely it would have sought evidence as to financial market prospects generally, as to the effect, if any, of a denial of the rate increase on the Company's prospects as the market became more normal, and whether an offering on more favorable terms was indicated. But at the hearings the Commission merely introduced the record of its security issue proceedings some months earlier, while the Company offered no evidence whatsoever, contenting itself with the mention of its financial needs by counsel in argument. Thus, far from obtaining proof of necessity, the Commission majority simply concluded that it would be advisable to cast the burden of a rate increase on the rate payers on the chance that the increase would be helpful to the financing prospects of a company which enjoyed an extraordinary record of prosperity (R. II, 421–422).

The evidence as to declining revenues fell equally far short of proof of necessity. Despite an abnormally mild winter in 1941–1942 (R. II, 384), the Company's gross revenue for the first seven months of 1942 greatly exceeded its gross revenue for the prior year (R. II, 383). This led to an increase in net revenues *before* income and excess profits taxes. However, the increased taxes caused a slight decline in net *after* taxes (Tr. 821–822). Clearly this provided no occasion for

concern to a company which, on its own figures, was earning five percent after taxes [10] on a substantially undepreciated rate base. This rate of return in fact was an understatement in view of the Commission's undue liberality in the treatment of depreciation expense and wartime taxes, noted above. Moreover, the Company had enjoyed an unusually prosperous history; and it had every prospect for increased wartime earnings.[11]

Shortly before the war this Court held that no substantial Federal question was presented by a refusal to increase gas company rates which were yielding five percent. *Peoples Gas Light & Coke Co.* v. *Hart*, 309 U. S. 634 (1940). See also Mr. Justice Stone, dissenting, in *West* v. *Chesapeake & Pot. Tel. Co.*, 295 U. S., at 682. "A return which was adequate then may not reasonably be increased now, if full effect is to be given to

[10] On the basis of the original data, the Company's return after all federal income and excess-profits taxes (computed under the then pending Revenue Act of 1942) was 4.87% for the year ended June 30, 1942. At the final hearing (R. I, 222 *et seq.*) it appeared the Company would save at least $36,000 on an annual basis as a result of the final provisions of the Act as enacted by Congress. This increased the Company's return to 5% for the same period, .13 percent of the rate base ($28,088,332) (R. II, 420) being approximately $35,000.

[11] These were realized. The Company's net income has mounted steadily since the fall of 1942. It paid an excess-profits tax in that year contrary to the Commission's assumption (R. I, 49).

the stabilization program and wartime economic exigencies.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted; and, if granted, it is requested that the case be advanced and assigned for argument at an early date.

CHARLES FAHY,
Solicitor General.

GEORGE J. BURKE,
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Office of Price Administration.

September 1943.

APPENDIX

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation be-

tween the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

SEC. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * * *

SEC. 7. * * *

* * * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section (2), or to invalidate any regulation, price schedule, or order issued or effective under this Act.

District of Columbia Code (1940 Ed.):

SECTION 43–317:

Nothing in chapters 1–10 of this title shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of chapters 1–10 of this title. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement. (Mar. 4, 1913, 37 Stat. 980, ch. 150, § 8, par. 18.)

SECTION 43–705:

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a pub-

lic utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the Clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: * * * Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal, the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

* * * * *

(Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 2.)

Act of March 4, 1913, 37 Stat. 974, (creating the Public Utilities Commission of the District of Columbia):

SEC. 8. * * *

PAR. 2. That every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is pro-

hibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by this section.

* * * * * *

PAR. 16. * * * The commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. These rates shall be such as will provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the commission. The commission may make changes in such rates of depreciation from time to time as it may find to be necessary. The commission shall also prescribe rules, regulations, and forms of accounts regarding such depreciation which the public utility is required to carry into effect. The commission shall provide for such depreciation in fixing the rates, tolls, and charges to be paid by the public. * * *

* * * * * *

PAR. 88. That whenever, after hearing and investigation as provided in this section, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in this section.

* * * * * *

PAR. 90. That the commission shall inquire into any neglect or violation of the

laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this section as well as all other laws relating to public utilities.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Preventing Inflation, and for Other Purposes", as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may

be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * * *

Id., Title VI—General Provisions:

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 396

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

WASHINGTON GAS LIGHT COMPANY, RESPONDENT

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, RESPONDENT

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v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

1. In its brief in opposition to certiorari, respondent Public Utilities Commission of the District of Columbia stresses the fact that its notice of hearing called simply for an investigation in conformity with the sliding scale arrangement, and the Commission acknowledges that it "refused to change and enlarge the issues and to broaden the scope of the hearings and ruled that the proceeding would be conducted pursuant to the terms of the order and the notice" (Br. in Opp. 7). Justification for this course is sought to be found in the Public Utilities Act of the District of Columbia, which confers on the Commission the power to adopt procedural rules and regulations (*id.* p. 13). But the statute, which authorizes a sliding scale arrangement, is careful to provide that the basic power of the Commission to determine reasonable rates is not to be fettered by such an arrangement. An arbitrary restriction of the hearing is opposed to, rather than supported by, the relevant provisions in Section 43–317 of the District of Columbia Code (see Pet. App., p. 24):

> * * * The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement [sliding scale], but the right and power to make such other and further changes in rates, charges, and

> regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement.

Moreover, the question whether the Act of October 2, 1942, has affected the power of the Commission to limit the scope of its hearing is an issue of substantial public importance, calling for determination by this Court.

2. The brief in opposition of respondent Washington Gas Light Company attempts to minimize the departure of the decision below from that of this Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, on the issue of depreciation expense (Br. in Opp. 14). In the *Pipeline* case the Federal Power Commission had found that, where an undepreciated rate base is adopted as the rate base, "unjust enrichment of the companies at the expense of the consumers is a most likely result" unless the interest rate in computing depreciation expense and the rate of return are the same. (2 F. P. C. Rep. 218, 230).[1]

[1] Recognition of the soundness of this position is contained in the recent Report of the Committee on Depreciation, National Association of Railroad and Utility Commissioners (1943), the summary of which states the following conclusion (p. xix):

"42. The sinking-fund method may sometimes be used in rate making when it is impracticable to determine the accrued

The issue in that case was a substantial one, involving the difference between the Commission's allowance of $1,557,582 for annual amortization and the company's claim of $5,100,732.

In the present case a financial expert on the staff of the Federal Power Commission, called by petitioners as a witness, attempted to explain that the calculation of depreciation expense under the sliding scale arrangement resulted in an overcharge to consumers of over $225,000 annually, so that the profit of the company was higher by that amount than as computed by the Commission (Ex. 8, R. II, 420, lines 4 and 5). The testimony of this witness was stricken on the ground that it was not a calculation made in pursuance of the sliding scale formula (R. I, 163, 165) and his exhibit (No. 8) was excluded for the same reason (R. II, 401).[2]

Even if the company had been correct in its assertion that under the *Pipeline* case a regulatory agency might authorize a mode of computing depreciation expense which, again to quote the Pow-

---

depreciation. When the sinking-fund method is used in rate proceedings, the interest rate employed should be the same as the rate of return which is applied to the *undepreciated* rate base." [Emphasis supplied.]

[2] Later the Commission acceded to the suggestion of counsel for respondents that, without waiving any of their objections to the exhibit, it should be admitted "for whatever weight it may have" (R. II, 403, 404; see R. II, 420). The Commission, however, ignored the issue of depreciation in its order fixing rates.

er Commission, would have as its "most likely result" the "unjust enrichment" of the company "at the expense of the consumers," the question would remain whether a regulatory body which had indulged in this liberty might nevertheless find the company entitled to a wartime rate increase without having recognized in so doing the fact that the method employed in computing depreciation expense had afforded profits to the company over and above the net return otherwise computed by the Commission.

3. Other contentions made by respondent Washington Gas Light Company serve to confirm the fact that the Commission, by its restriction of the scope of the hearing, was deprived of significant data essential to a determination of rates which would be just and reasonable and in conformity with the principles of the stabilization legislation. Thus, for example, it is contended (Br. in Opp. 13) that the Commission knew the actual cost of money to the company to be slightly more than 6½ percent. That question, however, did not enter into the proceedings; there were no findings by the Commission on the point; no testimony was presented thereon; and petitioners, if given an opportunity, would dispute the statement. Also, it is argued that the Commission allowed 5.57 percent as a rate of return for the ensuing year (Br. in Opp. 13). But, aside from the fact that this is computed upon a substantially

undepreciated rate base, it gave no consideration to the prospect of improvement in the company's business for the following year. To give consideration to a company's operating prospects should be prerequisite to the approval of any wartime rate increase, and the Commission's refusal to do so is inconsistent with its assertion of the company's necessity as a basis for the increase allowed.

Respectfully submitted.

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NOVEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

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No. 396

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (R. II, 428–449) is reported in 137 F. (2d) 547. The opinion of the District Court (R. I, 15–20) is reported in 48 F. Supp. 703.

The opinion of the Public Utilities Commission of the District of Columbia accompanying its order No. 2401 of October 13, 1942, granting a rate increase, is found at R. I, 39–57; the dissenting opinion appears at R. II, 271–317.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on July 26, 1943 (R. II, 451). Petition for certiorari was filed on September 29, 1943, and was granted on November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, and Section 43–705 of the District of Columbia Code (1940) being part of the Act of March 4, 1913, 37 Stat. 979, as amended.

QUESTIONS PRESENTED

1. Whether the Public Utilities Commission of the District of Columbia (the "Commission") failed to accord the Economic Stabilization Director (the "Director") and the Price Administrator (the "Administrator") their right to a full and fair hearing under the Act of October 2, 1942 (the "Stabilization Act").

2. Whether the Commission was under a duty, by virtue of its statutory responsibility to establish just and reasonable rates, and in view of the wartime economy and the national stabilization program, to refuse to grant any rate increase in the absence of a clear showing that an increase was necessary.

3. Whether the Commission was under such a duty by virtue of the Stabilization Act.

4. Whether the Washington Gas Light Company (the "company"), which on its own figures was earning a return of 5 percent on a substantially undepreciated rate base after all Federal income and excess-profits taxes, may be held to have made a clear showing that an increase in its rates was necessary.

5. Whether the Commission erred in its treatment of various items of expense, especially (a) the allowance as an operating expense of certain wartime corporate income taxes; and (b) the allowance of depreciation expense on a basis conflicting with that approved in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575.

STATUTES AND ORDERS INVOLVED

Section 1 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp II, Section 961:

> That in order to aid in the effective prosecution of the war, the President is

authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.* [Italics added.]

The pertinent provisions of the Emergency Price Control Act, Executive Orders, and the District of Columbia Code, are set forth in the Appendix, *infra*, pp. 98–108.

STATEMENT

1. The Proceedings Before the Commission

On March 20, 1942, the Commission issued Order No. 2219 directing that "an engineering and accounting investigation be made relative to the rates, tolls, charges, tariffs, rules, regulations and

conditions of service of the Washington Gas Light Company, including an investigation in conformity with the sliding-scale arrangement" (R. I, 33) (described *infra,* pp. 9 to 12). On July 21, 1942, the Commission issued a notice under such order for a formal public hearing "in accordance with the sliding scale arrangement established by Order No. 1458" (R. I, 34, 69–73). Hearings were held before the Commission on several days during August and September. At the first hearing a petition of the Administrator for leave to intervene was filed and without objection was granted (R. I, 34–37).

During the hearings counsel for the Administrator repeatedly moved that the basic provisions of the sliding-scale arrangement be re-examined in the light of the price-control legislation and, if necessary, that the scope of the proceedings be broadened to permit such inquiry in order that the true earnings and income of the Company might be ascertained and a determination made whether the Company would be subjected to any undue hardship if required to continue to operate at existing rates. All such motions were denied, on the ground that the issues were limited to the carrying out of the sliding-scale formula established in 1935. The Chairman on September 8 stated that questions pertaining to the basic elements of that arrangement were not within the scope of the proceeding (R. I, 121–123).

By oral and written motions (R. I, 150, 151, R. II, 345–346) the Administrator sought to reopen the proceeding for the purpose of taking evidence with respect to (1) effect of changed economic conditions upon the sliding-scale arrangement, (2) the necessity of revising the sliding-scale arrangement to take account of present economic conditions, "particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction," (3) effect of the government program to keep down the cost of living upon the arrangement, and (4) all other factors necessary to a proper determination of the justness and reasonableness of the rates of a public utility. The motions were denied by a two-to-one decision of the Commission (R. II, 409).

Thereafter, the Act of October 2, 1942 (*supra*, pp. 3–4; Appendix; *infra*, pp. 99–100), was approved, providing, *inter alia*, for thirty days' notice of utility rate increases to, and consent to intervention by, the President or his agent. October 3, 1942, the President issued Executive Order No. 9250 establishing the Office of Economic Stabilization (7 Fed. Reg. 7871).

On October 13, 1942, prior to notice to the Director, the Commission issued Order No. 2401 approving an increase in gas rates aggregating approximately $200,000, effective September 1, 1942 (R. I, 39–57). One Commissioner dissented

(R. II, 271-317), and concluded that the record justified a large rate reduction (R. II, 316–317). Two days later, the Company served the Director with notice, which did not embody a consent to intervention as required by the Act of October 2, 1942 (R. I, 188–189, 191). The Director, on October 14, 1942, by his Directive No. 1, had designated the Administrator as his representative to receive such notice and to intervene and participate in proceedings upon proposals to increase rates or charges (7 Fed. Reg. 8758).

On October 19, 1942, the Director, by his representative, filed a petition with the Commission praying that Order No. 2401 be vacated, that the proceeding be reopened for the purpose of receiving further evidence and hearing further argument, and that the Director be permitted to intervene and to file a brief in such reopened proceedings (R. I, 57–60). The Commission on October 23, 1942, issued Order No. 2404, which reopened the record "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401," and intervention was "granted for such purpose" (R. I, 60–63). This order, from the limitations of which one Commissioner dissented (R. II, 317), fixed November 2, 1942, as the date for further hearing. On October 30,

1942, the Company finally consented to intervention by the Director (R. I, 191).

A further petition was thereafter filed on behalf of the Director on October 31, 1942, which alleged, *inter alia,* that Order No. 2404 unnecessarily restricted the Director's right of intervention and improperly limited the type of evidence which the Commission would receive. It further pointed out that in Order No. 2404 the Commission failed either to grant or to deny the prayer of the earlier petition to vacate Order No. 2401 (R. I, 63–65). This petition was denied by an oral ruling of the Commission on November 2, 1942 (R. I, 214–215). One Commissioner dissented from this ruling in a comprehensive opinion (R. II, 322–336).

Hearings were held on November 2 and 4, 1942, devoted chiefly to an effort to secure the withdrawal of the limitations imposed by Order No. 2404. On November 9, 1942, the Commission issued Order No. 2418 denying the petition that Order No. 2401 be vacated, one Commissioner renewing his dissent (R. I, 66–67). Petitions for reconsideration were filed on November 12, 1942, on behalf of the Director and the Administrator setting forth in detail errors in the Commission's procedural rulings and in its determination of just and reasonable rates (R. II, 336–338, 346–353). Both petitions were denied on November 16, 1942, by Commission Orders Nos. 2422 and 2423, one Commissioner dissenting (R. II, 338–339, 353).

Since the hearings were addressed to the sliding-scale formula, an explanation thereof is given at this point.

2. The Sliding-Scale Arrangement

This arrangement was the outgrowth of rate litigation stemming from proceedings instituted by the Commission to bring about a reduction in the gas rates of the company. On March 19, 1935, the Commission entered an order fixing $15,039,000 as the fair value of the undepreciated property of the company as of June 30, 1935. Following further hearings and discussions between representatives of the company and the Commission, the Commission approved the sliding-scale arrangement (Order No. 1458) (Exhibit C, Tr. 258 ff.) as proposed by the company and found it to be in conformity with Paragraph 18 of the Public Utilities Act (Tr. 256 ff.). This Act authorized the company, subject to Commission approval, to provide a sliding scale of rates and dividends. (District of Columbia Code, sec. 43–317, pp. 103–104, *infra.*)

The arrangement prescribed an initial (an undepreciated) rate base of 21 million dollars,[1]

[1] Order No. 1458, Finding No. 2, Section 1, Dec. 13, 1935 (Ex. C, Tr. 256, 261), and Order No. 2682, Nov. 8, 1943, note 17, p. 30, in dissenting opinion; also Transcript in P. U. C. No. 3361, Formal Case No. 334, Aug. 31, 1943, In the Matter of Investigation of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, pp. 61 and 78–91. The rate

and provided that the initial base should be brought up to date, annually, by means of adjustments for net additions to property, less consumers' contributions and less allowances for the proportion of the property used for service outside the District of Columbia. To the property account, an allowance equal to the monthly average of materials and supplies, plus 10% of the annual operating expenses exclusive of taxes and retirement accruals, must be added to give the rate base. (Sections 2 and 3, Order No. 1458, Finding No. 2) (Ex. C, Tr. 258, 262–264, 265). It was further stipulated that the primary rate of return should be 6½% (Section 2D) (Ex. C, Tr. p. 258, 264).

This arrangement also provided a formula by means of which the annual depreciation expense should be calculated (Section 8) (Ex. C, Tr. pp. 258, 266). The annual charge was to be 1¾% of the rate base less the actual earnings of the ac-

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base was taken as $21,000,000, although it was shown at the hearing that this figure was in excess of the reproduction cost new, as of 1932, plus net additions to June 30, 1935, with nothing deducted for depreciation. It was also apparently higher than the original cost new as of the same date. The Commission had found that, as of June 30, 1932, depreciation, to the extent of over $3,000,000, was an existing fact (P. U. C. Order No. 1341, p. 64, (Ex. A, Tr. pp. 124, 191) and No. 1342, p. 13, March 19, 1935 (Ex. B, Tr. pp. 239, 252)). In addition land was still carried, as of June 30, 1943, in the rate base at $821,000 above its original cost (Tr. in P. U. C. No. 3361, Formal Case No. 334, Aug. 31, 1943, p. 17).

cumulated retirement reserve, or less 4% of the average weighted monthly balance of the reserve, if it is not invested outside of the company. This percentage was to continue in effect until the accumulated reserve should exceed 10% of the rate base. As long as the reserve exceeded 10%, the percentage charge used in calculating the annual depreciation was to be 1¼%.

It was also provided that if operating expenditures for production labor, natural gas, other fuels, or taxes, or any one of them, should increase or decrease in excess of 5% of the expenditure in the (previous) test year, then an adjustment in an equal amount should be made in the amount available for return (sec. 6) (Ex. C, Tr. 258, 265, 266).

The plan also provided (Section 2D) (Ex. C, Tr. pp. 258, 264) that, if the rate of return earned should exceed 6½% in any given year, then the revenue should be reduced the following year by certain percentages beginning with 50% of the return earned over and above 6½%. If the return falls to a point above 5½% but not over 6%, then revenues and rates should be increased during the following year by ¾ of the difference between the computed return and 6½%. Where the return falls below 6½%, but not below 6%, no increase is to be made unless the condition continues for two consecutive years. If the return falls to 5½% or below, the amount of increase is ⅚ of the deficiency.

It should be noted that, if the company earns in excess of 6½% in any year, the arrangement does not provide for the taking of any part of that excess income away from the company, but merely for a prospective reduction in the *gross* revenues during the following year. This reduction would never exceed an amount equal to a substantial portion of such *net* income as was in excess of the 6½% in the test year.

Since the company was earning considerably in excess of 6½% on the rate base (Exhibit 12 (R. II, 422) shows it earned 8.5 to 10.6% between 1927 and 1934) the company made a rate reduction of $800,000 on January 1, 1936. It also made prospective reductions of $47,433 on June 30, 1936, $50,492 on June 30, 1938, $163,575 on June 30, 1939, and $63,417 on June 30, 1940, representing 50% or more of the excess earnings during the respective prior years (Exhibit 11, R. II, 421).

3. The Decisions Below

On appeal under section 43–705 of the District Code, *infra*, pp. 105–106, the district court set aside the decision of the Commission, held its action "arbitrary and illegal" and directed that the Commission's Order No. 2401 should be vacated (R. I, 15–21). The court held that the Commission had "regarded the inquiry within narrow limits" (R. I, 18) and "closed its ears to the insistent demand of appellants to give consideration to the new factors required by the act

of October 2, 1942" (R. I, 18). The court ruled that the "right conferred upon the President and his representatives was not a mere formality" (R. I, 19) and "the privilege of intervention is one of substance and has direct relation to the avowed purpose of Congress to stabilize prices, wages and profits" (R. I, 19).

On appeal to the Court of Appeals, that court, Justice Miller dissenting, reversed the district court and sustained the Commission's order. The court held that the right of intervention under the Act of October 2 did not

> * * * confer upon him the power to participate in the decision or to control the proceeding, but merely the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation, with the right of appeal where the Commission's action is reviewable by the courts. [R. II, 435.]

The court also held the order could not compel the Commission "to undertake a complete rate investigation against its better judgment much less an investigation upon lines contrary to the governing statute" (R. II, 442). The court apparently held that a fair hearing had been granted and that the Commission was under no obligation to broaden the scope of the inqury.

In his dissenting opinion Justice Miller took the position that Congress intended the Act of

October 2 to qualify the rules of the Commission insofar as it was necessary to accomplish the purposes of the Act. If intervention were limited to a showing that an increase was inflationary, he observed, the Act would be reduced to absurdity. He disagreed with the majority that the only alternative to such an intervention was the power to participate in the decision or to control the proceeding, and he concluded that the argument that a large-scale expensive investigation would be necessary "was advanced by the Commission and supported by the Company as camouflage to hide their unwillingness to permit any inquiry which did not assume and admit the infallibility of the sliding-scale arrangement" (R. II, 446).

SUMMARY OF ARGUMENT

I

The notice-and-intervention procedure established by the Stabilization Act of October 2, 1942, contemplates more than a formal or nominal appearance on behalf of the President's representative. The general objective of the Act was stabilization of the entire economy at September 15, 1942, levels. With respect to utility rates, the existing regulatory agencies were left with jurisdiction over rates, but they are obliged to afford a full and fair hearing to the Administrator as statutory intervenor. (Cf. *Federal Communications Commission* v. *National Broadcasting Co.*,

319 U. S. 239.) Early stages of the present proceeding were brought to the attention of Congress as an illustration of the need for legislation.

A full and fair hearing requires, at a minimum, consideration of data bearing on the true earnings and returns of the utility. Whether such a hearing may be conducted in two parts, the first directed to calculations under an antecedent sliding scale arrangement and the second devoted to a scrutiny of the result to determine whether a genuine need for an increase had been shown, is a question not here involved. The Commission did not grant to petitioners the right to demonstrate the true earnings and returns of the company, holding itself precluded by the sliding scale formula.

II

The Commission has acknowledged that the hearing was conducted under the limitations of the sliding scale arrangement. These limitations were enforced by the rulings on numerous motions and attempts to elicit testimony. Thus an effort was made to show that under a proper sinking fund method of charging depreciation expense, the earnings of the company would be revealed in fact to be more than $225,000 in excess of those stated by the company. This amount would in itself have eliminated the rate increase. Moreover, the Commission refused to consider whether the company was computing its return on a rate base in excess

of original cost. It refused to consider the prospect of increased revenues in the coming year, and the circumstance that revenues during the prior year were abnormally low because of an unusually mild winter. It refused to consider what was a proper rate of return under prevailing wartime conditions, and was content to grant an increase under the sliding scale arrangement even though the company's own figures showed that its earnings were 5% on an undepreciated rate base after all taxes.

The inquiries which the petitioners deemed relevant would not have converted the hearing into a rate proceeding of undue length or complexity. Reproduction cost estimates were not, of course, sought to be introduced. There was an obligation on the Commission, if it deemed the petitioners' requests impracticable in their entirety, to indicate appropriate qualifications. It was not enough that the Commission offered an opportunity to make general representations concerning the inflationary effect of the rate increase which it had approved.

The authority of the Commission to prescribe rules of procedure does not enable it, even under its own governing statute, to abdicate its continuing responsibility to prescribe rates which are just and reasonable. Still less does the rule-making authority justify a denial to petitioners of their statutory right as intervenors to a full and fair hearing.

III

While the petitioners were denied the minimum rights to a hearing under the Act of October 2, it becomes pertinent to consider further the standards which should govern the Commission in passing on a rate increase if the present case is to be remanded. Those standards cannot be divorced from the problem of utility rate increases under a wartime stabilization program. That problem has become one not of preventing sharp and spectacular price rises through selected controls but, as reflected in the Stabilization Act of October 2, 1942, one of avoiding any unnecessary price increases. The duty of the Commission under its own statute to fix just and reasonable rates requires that the canon of necessity be considered. In this view, increases can be deemed just and reasonable only where real hardship is shown, or the company's property is being confiscated, or it is unable to supply additional wartime demands for its service, or unjustifiable discrimination exists.

Under the Stabilization Act itself the Commission, like the petitioners as intervenors, is to be guided by the standard of necessity. It is of no relevance that the President was not given the power to suspend the exemption of public utility rates contained in the Emergency Price Control Act, for, of course, the regulation of utility rates has not been committed to the President or the Price Administrator.

The reliance by the court below on remarks in the Senate to the effect that the intervention procedure would have simply a moral effect gives insufficient weight to the fact that the remarks were made by one who was not completely familiar with the measure as it emerged from conference and who was disappointed that it did not retain the provision which had passed the Senate, giving the President a veto power over utility rate increases.

IV

Even the limited record before the Commission discloses that there was no showing of hardship or of need for a rate increase, and the order may properly be set aside on that ground without remand. A return of 5% on an undepreciated rate base is not so low as to justify a rate increase under the standards applicable in the light of present conditions. The credit position of the company did not require or justify the increase. Its unusually prosperous history and excellent prospects were of far greater weight than its temporary lack of success in floating a stock issue at a time when, as the Commission itself recognized, market conditions were depressed. Nor was the increase justified by reason of the Commission's disallowance as operating expense of income taxes at rates above those in effect for 1941. It was in 1940 that extraordinary emergency and wartime corporate taxation began, and the Commission should have disallowed as operating expense taxes

in excess of the 1939 rates or, if allowing these as expenses, should have made an appropriate downward adjustment in the permitted rate of return. Only thus would the Commission have properly apportioned the burden of wartime taxes.

ARGUMENT

Introductory: Scope of the Issues.—It is our position that, under the Act of October 2, 1942, the petitioners were entitled, as intervenors, to a fair opportunity to demonstrate the true earnings and returns of the company as a condition precedent to the granting of a rate increase. It is submitted, moreover, that such consideration was precluded by the restrictions imposed on the hearing, and that therefore the order of rate increase could not properly be affirmed. These contentions are developed in Points I and II, *infra*. If our conclusion in this regard is sound, the case must, at the least, be remanded for a further hearing before the Commission, as provided in the District of Columbia Code, Section 43–705, *infra*, pp. 105–107. In remanding the case, it becomes appropriate to consider the standards by which the Commission should be governed in passing on the application for an increase. These standards are to be found both in the statutory duty of the Commission to prescribe just and reasonable rates, in the light of wartime conditions and the national stabilization program, and in the Act of October 2. These standards are discussed

in Point III, *infra*. Finally, we shall contend in Point IV, *infra*, that on the limited record before the Commission there was no evidence to justify a rate increase on the basis of these standards and that accordingly the order may be vacated absolutely, pursuant to the section of the Code cited above.

It will be observed that the questions raised do not turn on the mere construction of a local law and are not of limited local importance. Not only are the duties of the Commission under its statute essentially like those of federal rate-making bodies, but those duties cannot be considered apart from the supervening effect of national conditions and national legislation.

I

Under the Stabilization Act of October 2, 1942, the Petitioners Were Entitled, as Intervenors, to a Full and Fair Hearing Before the Commission on Matters Relating to the Earnings and Returns Realized by the Company Which Would Facilitate an Accurate Determination by the Commission of the Company's Need for a Rate Increase

A. The objective of the notice-and-intervention procedure

In establishing the notice-and-intervention procedure as a part of its stabilization machinery, the Congress did not look merely to a formal appear-

ance on behalf of the President. Rather it sought by providing means of effective intervention before regulatory authorities to keep utility rate increases to a minimum, within the purposes of the Stabilization Act of October 2, 1942.

The Act of October 2, 1942, was enacted when the national economy was in jeopardy. Its purpose was to halt the inflationary trends then accelerating[2] and, in particular, to supplement existing controls over commodity prices with new controls over agricultural prices, over wages and salaries, and over common carrier and other public-utility rates. Stabilization of the entire economy at September 15, 1942, levels was its goal.

It is in the light of this objective that the procedure prescribed in the proviso to Section 1 of the Stabilization Act must be viewed. Its requirement that every common carrier and other public utility in the nation give 30 days' notice of

[2] The Senate Committee on Banking and Currency, in its report to accompany S. J. Res. 161 (the Stabilization Bill) 77th Cong., 2d sess. (1942), declared: "The facts presented in the President's message and in testimony before your committee disclose clearly that certain basic factors affecting the cost of living are inadequately controlled in large part because of existing limitations upon administrative powers. In recent months, the economic situation has passed from the critical to the dangerous. There are impending immediately over the horizon such extreme inflationary increases in the cost of living as may jeopardize our entire war program and our economic stability." Sen. Rep. No. 1609, 77th Cong., 2d sess., Sept. 19, 1942, p. 6.

rate increases and consent to intervention by the President's designee was not included in the Act as a perfunctory gesture; the extent to which the problem was the subject of Congressional concern may be measured by the fact that the Senate had adopted a provision giving to the President a veto power over all rate increases. (88 Cong. Rec. 7632.) The conferees' substitution of the notice-and-intervention procedure for the drastic Senate provision reflected, not an unwillingness to stabilize utility rates, but a desire to utilize the existing regulatory agencies for that purpose.[3]

The notice-and-intervention procedure necessarily contemplated the establishment of an office within the Federal Government adequately staffed

[3] See remarks of Congressman Wolcott, a conferee, 88 Cong. Rec. at 7740: "We do not leave utility rates floating around in the air, we leave them under the same jurisdiction they have been under for generations. We have respected the constitutions of the several States, many of which provide that utility rates shall be determined by a utilities commission set up by the people of that State. * * *

"However, we have provided as a substitute for the Norris amendment which we struck from the bill, a provision that the President or any agency that he may designate may intervene in any rate case; 30 days' notice must be given before any rate can be increased, allowing the Price Administrator or anyone else whom the President designates to intervene to protect the public interests, if they do not feel they are sufficiently protected by the utility commissions of the respective States."

The conference report describes the notice-and-intervention provision without discussing it. H. Rep. 2513, 77th Cong., 2d sess., p. 6.

to receive and examine rate increase notices, to determine whether to intervene before the regulatory agencies having jurisdiction, and, where intervention was decided upon, to prepare and present evidence and argument in opposition to the proposed increase, if so desired. Clearly no justification would have existed for setting up this governmental mechanism if the intervention thus implemented were not to be effective intervention. Accordingly, the Court of Appeals was correct in implying the requirement of a "fair hearing" from the terms of the Act requiring the utility's consent to its timely intervention" (R. II, 434–435), since a fair hearing is essential to effective intervention. But neither the Court nor the Commission was justified in allowing limitations to be imposed upon the scope of the hearing when those limitations were inconsistent with effective intervention.

Reinforcement of the view that Congress sought to assure the President's representative a full and fair hearing is found in the legislative history of the Stabilization Act. When Senator Norris introduced his amendment to the Stabilization Bill which, as has been noted, would have granted the President a veto power over utility rate increases, he exemplified the need for such a measure by pointing to the difficulties which the Administrator had been experiencing as intervenor before the Public Utilities Commission of the District of

Columbia in this very case.[4] It cannot be supposed that, in a measure originally designed to put an end to such difficulties, the Congress in actuality merely perpetuated them, and that the Commission's conduct in this case satisfies the requirements of the Stabilization Act. Certainly no such conclusion should be reached unless the statutory language requires it.

Such is not the case. Judge Letts in the District Court and Justice Miller in the Court of Appeals gave a reading to the Act which allows its purposes to be effectuated.

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[4] On September 10, 1942, Senator Norris said, in introducing a bill to confer on the Price Administrator power to veto rate increases (88 Cong. Rec. at p. 7101):

"Mr. President, Mr. Henderson mentions one place where he made an effort to prevent increasing gas rates, namely, in the city of Washington. I think it would not be unfair to say that, figuratively speaking, when Mr. Henderson's representatives appeared before the Utilities Commission here they were politely shown the door. It is true Mr. Henderson has no authority to fix gas rates in the city of Washington, but, as I have said, his representatives were there for the purpose of trying to convince the Commission that an increase in gas rates in the city of Washington meant that all the prices which he had fixed, after investigation, expense, and time, would all be knocked into a cocked hat. As I read the reports in the newspapers, I do not think that the representatives of the Price Administrator were treated with very great respect."

On September 30, 1942, Senator Norris again alluded to this case (88 Cong. Rec. at p. 7878).

Further discussion of the legislative history will be found in Point III, *infra*, pp. 72–77, in connection with the standards to be applied by the commissions in passing on proposed rate increases.

B. THE SCOPE OF INTERVENTION PURSUANT TO THE STABILIZATION ACT

The provision for intervention in the Stabilization Act imposed on the petitioners and on the Commission, respectively, the following duties: It is petitioners' duty as intervenors to bring to the Commission's attention the respects wherein they believe the true earnings and return realized by a utility to be understated in the evidence before the Commission and to raise any other substantial issues pertinent to the question whether the utility is entitled to a rate increase. The Commission's duty to accord the intervenors a full and fair hearing includes the duty to accept and consider relevant evidence proffered by them and, so far as practicable, to determine all substantial issues raised by them relating to the utility's claim to an increased rate.

This statement, we submit, is in accord with the view expressed by Judge Letts and Justice Miller; it is in conflict with the view taken by the majority of the Court of Appeals. Judge Soper derived from the legislative history of the Stabilization Act the conclusion that the Act gave the President's representative "merely the right to show that an increase in rates would tend to increase the cost of living and thereby impair the stabilizing effect of the government's price regulation * * *" (R. II, 435).

The short answer to this view of the Act's effect is Justice Miller's who declared that so

to "limit the effect of the present Act * * * would reduce it to an absurdity. It is a matter of common knowledge that increases in rates tend to increase the cost of living. The Commission might well be expected to take notice of the fact. Intervention and fair hearing would not be necessary to make such a showing. If no more had been intended by the Act it could have been so indicated therein without requirement of notice or intervention" (R. II, 444). He claimed for the intervenors no more—and no less—than the rights of "any other party." He invoked the decision of this Court in *Federal Communications Commission* v. *National Broadcasting Company,* 319 U. S. 239, in which a person entitled by statute to a notice of hearing and authorized to show cause why a license application should not be granted was held entitled to be "afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party." (*Ibid*).

More specific guidance as to the duties of the intervenor under the Stabilization Act may be gained from the reasons which lead to intervention in a given case. Not all rate increases are opposed by petitioners, or should be. If, without exception, rate increases were injurious to the national economy, no doubt Congress would have prohibited them flatly, but, just as Congress gave the President authority to authorize necessary adjustments in prices, wages, and salaries above September 15, 1942, levels, and just as the Senate

proviso would have extended his authority to utility rate increases, so the intervention procedure supposes an increase in some utility rates above the September 15, 1942, level.

What standards are appropriate in differentiating between those rate increases which are consistent with the stabilization program and those which are not will be considered in Point III, *infra*, pp. 57–78.

For the purpose of determining the scope of the hearing, it is necessary only to demarcate the range of inquiry. This may be done by noting the extremes. Thus in one case a highly prosperous utility seeks to take advantage of a contract provision for the automatic escalation of its rates; in another case, a utility which has undertaken unusual and unprofitable burdens in meeting war demands, seeks a rate increase when it finds itself unable to meet operating costs out of revenues. Obviously, if any rate increase is to be opposed, it would be the former; if any rate increase is to be tolerated, it would be the latter. What differentiates the two cases, basically, is the difference in the financial situations of the two companies. One has no need for the increase; the other not only is in need but its need is such that its capacity to serve the war effort is imperiled.

Of course, most cases cannot be disposed of so readily. To determine whether a rate increase is

needed usually calls for a "searching investigation," as Judge Letts observed (R. I, 19).[5] If errors in the data or in the legal premises on the basis of which they have been proffered result in an understatement of the Company's earnings or the rate of return yielded by its earnings, what may have seemed an imperative case for a rate increase may be revealed as one where no increase is called for.

Whatever the standards which may be formulated to govern rate increases under a wartime stabilization program, it is clear that they cannot exclude as irrelevant the true earnings and return realized by the utility. These are the basic facts on which informed judgment is to be exercised. To refuse to consider them is to be arbitrary.

It was the duty, therefore, of the Commission, in according a hearing to petitioners in the instant case, to accept and to give careful consideration to such competent evidence as they tendered on matters relating to the earnings and returns realized by the company. Indeed, it was the Commission's duty to determine any substantial issues relating to earnings and return and to the proper rate of return, whether those determinations were based upon evidence offered by the in-

[5] In procedural Regulation No. 11 the Price Administrator has prescribed the data which utilities seeking rate increases are to furnish at the time the statutory notice is given. 7 Fed. Reg. 9390.

tervenors or upon evidence offered by the Company or by the Commission.

The Commission's conduct of the proceedings has been defended during the course of this litigation* on the ground that the Commission has divided the problem before it into two parts: (1) what rates were indicated by the sliding scale arrangement, and (2) whether, if an increase were indicated, it was in conflict with the national stabilization program. With such a plan for the conduct of the proceedings, petitioners would have had no quarrel if the Commission had construed its responsibilities under point 2 to include an inquiry into the actual earnings and return realized by the Company unless it were ready, without such inquiry, to deny a rate increase.

As will be shown in Part II of this brief, the Commission did not so construe its obligation, but instead complained that the intervenors were requiring it to abdicate control over the proceeding. This was not the case. As Justice Miller observed and as will be developed in Part II, there were alternatives open to the Commission which would have enabled it to avoid both the Scylla of a "complete rate investigation" which Judge Soper erroneously insists (R. II, 441) was what intervenors sought and the Charybdis of a hearing confined to the sliding-scale arrange-

*See Brief of Respondent, Washington Gas Light Co., in Opposition to Petition for Writ of Certiorari, at p. 13.

ment. The statute cannot, of course, be supposed to have demanded the administratively impracticable of the Commission, yet it did impose on the Commission the simple obligation of accommodating its procedure to the new responsibilities arising out of the wartime stabilization program.

Release from this obligation is not to be found in the decision of this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, present Term. It was to a quite different point that the opinion of the Court was directed when it said: "* * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." The justice and reasonableness of a rate order cannot be determined unless a hearing has been conducted which has provided a presentation of the relevant facts sufficiently comprehensive to allow those judgments to be drawn. If that has been done, then, as the *Hope* case makes plain, the regulatory authority need not, in obtaining its end result, pursue those intellectual processes which the court may think most appropriate. But if a commission's conclusion is to be reviewed, the court must have access to the facts, and not to an artificial selection from the facts. What this Court

stated in *National Labor Relations Board* v. *Indiana and Michigan Electrical Company,* 318 U. S. 9, 28, is clearly applicable here:

> But courts * * * are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

The position of petitioners concerning the right to a full and fair hearing under the Act of October 2, 1942, has recently been sustained by a three-judge court in *Jersey City and Vinson* v. *United States and Hudson & Manhattan Railroad,* decided January 12, 1944 (D. N. J.), wherein the court held this right to have been denied by the Interstate Commerce Commission's refusal to consider evidence offered "to show that the carrier's rise in business and net earnings had completely removed any reason for an increase over the eight-cent fare,"—testimony which in the judgment of the court "went to the heart of the controversy."

II

THE COMMISSION DENIED THE DIRECTOR AND PRICE ADMINISTRATOR A FAIR AND FULL HEARING

A. THE LIMITATIONS IMPOSED BY THE COMMISSION UPON THE HEARING

1. The general rulings of the Commission

The Commission has acknowledged that it limited the scope of the hearing to the sliding scale arrangement. In its brief in opposition to the petition for certiorari (p. 7), the Commission states:

> The statutory order instituting the investigation and the statutory notice did not call for a reexamination, reconsideration and revision of the provisions of the sliding scale. On the contrary, both called for the annual investigation in conformity with the sliding scale arrangement. The Commission refused to change and enlarge the issues and to broaden the scope of the hearings and ruled that the proceeding would be conducted pursuant to the terms of the order and the notice. (R. I, 97, 106, 121-123, 132).

Again, the Commission asserts (*id.* p. 14):

> The Petitioners sought to cause the Commission to review the basic elements of the sliding scale plan and to revise the provisions thereof. This could not be done under the order of investigation or notice of hearing, and to have done so would have been in violation of statutory requirements.

These statements accurately reflect the position of the Commission.[7] But petitioners sought a "revision" only to the extent necessary to determine whether undue hardship would be imposed on the company if required to continue to operate at existing rates. The Commission's narrow view of the case was, of course, consistently urged upon the Commission by counsel for the company during the hearing. When counsel for the Administrator attempted to persuade the Commission that the right of the company to higher charges should be determined by the question whether any undue hardship would result if the company were required to continue to operate at existing rates, counsel for the company not only frankly admitted that the sliding scale arrangement had not operated in such a way as to cause any hardship to the company but contended that the issue was immaterial. Company counsel stated (R. II, 386):

> The first question Mr. Booth mentioned was whether or not the sliding scale has worked a hardship on the Company. There is no such issue in this case. No one claims it has. The question whether it did or did

[7] See also the opinion of the district court (R. I, 17): "Appellants [respondents here] contend that by its rulings and pronouncements it limited its consideration to such data as would enable it to apply the formula of the sliding scale arrangement in determining what rates were authorized by the sliding scale arrangement."

not does not seem to be material in any event. No one is contesting the point.

Both the Director and Administrator made repeated requests that the Commission remove the restrictions on the hearing. These were made both orally and in writing. The Administrator's petition for intervention granted without limitation (R. I, 73) expressly asked for reconsideration of the sliding scale arrangement in the light of the government's stabilization program. On September 14, counsel for the Administrator moved orally (R. I, 151):

> * * * that the Commission issue appropriate orders under which the Commission can in this proceeding give consideration to all relevant facts under which fair and reasonable rates can be determined, by a reconsideration of the sliding scale arrangement in the light of economic conditions which we are now in, in the light of the Government's program to stabilize prices, and in the light of all other factors which the Commission must as a matter of law consider in their determination of fair and reasonable rates.

This motion was taken under consideration (R. I, 151) but no ruling was made on it. On September 28, the Administrator filed a written petition making a similar request, directing attention, *inter alia*, to the question of rate of return and allowance of federal income taxes as operating

expenses.[8]. This petition was denied on September 30 (R. II, 409).

The Commission imposed the same restrictions upon the participation of the Director as were previously imposed upon the Administrator. Both company and Commission have insisted that the Director had no greater right to broaden the scope of the hearing than had the Administrator.[9] Moreover, by the Commission's order of October 23, the Director was restricted to the presentation of "additional evidence relating to the inflationary

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[8] The motion concluded with the following prayer (R. II, 346):

Wherefore, your Petitioner renews said motions and respectfully requests that the Commission issue appropriate orders to:

Reopen this proceeding and direct that further evidence be taken with respect to:

1. The effect of present changed economic conditions upon the provisions of the "sliding-scale arrangement" made in 1935.

2. The necessity for revision of the provisions of the "sliding-scale arrangement" because of present economic conditions, particularly those provisions which relate to rate of return and the allowance of federal income taxes as an operating revenue deduction.

3. The relationship and effect of the Federal Government's program to control inflation and stabilize the cost of living to the "sliding-scale arrangement" and the proceeding.

4. All other factors which are ordinarily necessary to a proper determination of the justness and reasonableness of the rates and charges of a public utility.

[9] The court below held that there was no substantial change in the parties as a result of the passage of the Act of October 2.

effect, if any, of an increase in rates authorized by Order No. 2401, and intervention is granted for such purpose" (R. I, 62–63). During the argument (R. I, 200–208) upon the motion (R. I, 63–65) of the Director asking that the restrictions be eliminated, the Commission was requested to rescind its order of October 13, and to broaden the issues to give the Director an opportunity to demonstrate the true earnings of the company on the basis of proper rate-making principles construed in the light of wartime conditions. The issues of the proper rate base, depreciation expense, war taxes, and fair rate of return were specifically itemized (R. I, 207). These requests were refused by the Commission, as were petitions for reconsideration (R. II, 336–338, 346–353; *id.*, 338–339, 353), one Commissioner dissenting.

That petitioner's requests were administratively practicable and were directed to issues of consequence in the determination of just and reasonable rates under wartime conditions will, we believe, become evident in the following analysis of the Commission's rulings governing specific subjects and of the views of the Court of Appeals with respect thereto.

2. The rulings governing specific subjects.

a. The Commission prevented an inquiry into the additional profits accruing to the company under the sliding-scale method of charging depreciation expense

The Commission denied the right of the Administrator to present evidence, cross-examine witnesses or obtain a determination on the issue whether the Company was securing an additional profit at the expense of its customers by the use of an undepreciated rate base. That the rate base upon which the return of the Company was computed was undepreciated cannot be denied.[10]

We turn to the rulings by the majority of the Commission on this point. An effort was made by cross examination of the Commission's own witness to demonstrate that accrued depreciation was not properly offset by the 4% credit on the depreciation reserve. Cross-examination on these points was restricted by the Chairman, as is shown by the following ruling (R. II, 394; see also *id.* 390):

> Mr. BOOTH. Mr. McElfresh, you indicated earlier in your testimony that the operation of the 4 per cent is intended to provide for accrued depreciation. You do not by that statement mean to imply that it correctly takes care of accrued depreciation in this property in the determination of rates except that * * *. the 4 per cent is merely the proper mathematical calculation under the sliding scale arrangement?
>
> Mr. STEVENS. I object to that question.
>
> * * * * * *

[10] The Commission's opinion in *In re Washington Gas Light Company*, November 8, 1943, states: "Under the provisions of the sliding scale arrangement, the rate of return is applied to an undepreciated rate base" (p. 16).

Chairman FLANAGAN. The objection is sustained. If the questions are confined to the proper calculation made under the sliding-scale arrangement which has been in effect for years, then there is no reason to object to it.

And the Commission prevented the presentation of testimony by the Administrator's witness, a qualified employee of the Federal Power Commission (R. I, 158–159), on this subject when it ruled as follows (R. I, 163–165):

Mr. BOOTH. How did you arrive at the figure of $26,000,000 in Exhibit 8?

Mr. JOSEPH. The $26,000,000 represents my estimate of the maximum amount of depreciable property contained in the rate-base figure of $28,088,332 shown in Column headed P. U. C. Accountants. Materials and supplies, cash working capital and land should be excluded in arriving at the amount of depreciable property. I have estimated that the non-depreciable property contained in the rate base figure of $28,088,322 is equal to at least $2,088,332.

Mr. STEVENS. I move to strike the answer, Mr. Chairman * * *.

Chairman FLANAGAN. I think that motion is well taken.

* * * * *

Chairman FLANAGAN. Mr. Booth, this is so far removed from the limits which I have attempted to impose that I must grant the motion to strike that question with re-

gard to the depreciation. Another factor has now been injected, which is Mr. Joseph's attempt to evaluate this property.

Mr. BOOTH. I think you misunderstand, Mr. Chairman.

* * * * *

Chairman FLANAGAN. Let me clarify one thing. As I understand it, Mr. Joseph, in using the sinking fund method, you have followed what Mr. Booth classifies as the determination made by the Federal Power Commission in the case of Natural Gas Pipeline Company of America; is that true?

Mr. JOSEPH. Yes, sir.

Chairman FLANAGAN. With regard to percentage?

Mr. JOSEPH. With regard to the application of the sinking fund method of depreciation.

Chairman FLANAGAN. Can you mention any points of similarity between the Natural Gas Pipeline Company and the Washington Gas Light Company in the nature of their business?

Mr. JOSEPH. The nature of accounting for both the Natural Gas Pipeline Company of America and the Washington Gas Light Company is precisely the same in that they keep their records under the Federal Power Commission's uniform system of accounts.

Chairman FLANAGAN. But you have not taken the rate of depreciation specifically

set out in the sliding-scale arrangement, have you?

Mr. JOSEPH. I have changed that to conform to the sinking-fund method of depreciation.

Chairman FLANAGAN. I am afraid I shall have to support the motion to strike the answer with respect to depreciation.

And an exhibit containing such a calculation was excluded (R. II, 401):

Chairman FLANAGAN. * * * Exhibit No. 8 is in direct variance with the calculation called for under the sliding-scale arrangement. The method of calculating depreciation is no more correct than a calculation under the direct method would be. For those reasons Exhibit No. 8 is not admitted.

* * * * *

Chairman FLANAGAN. The exhibit is excluded in its entirety.

It is true that following a change of heart upon the part of counsel for the company the majority members of the Commission assented to a suggestion from company counsel that Exhibit 8 be admitted "for whatever weight it may have" (R. II, 403), without waiving the objection to it (*id.* 404). But the decision of the Commission shows clearly that the exhibit (R. II, 420), insofar as it related to depreciation, was not considered by the Commission.

That in thus failing to permit the introduction of the evidence or to give evidence of its consideration, the Commission denied petitioners a full and fair hearing becomes plain when the significance of the evidence is considered. The difference between the proper charge for depreciation expense under the sinking fund method and the charge under the sliding-scale arrangement, as the Administrator's witness attempted but was prevented from demonstrating in Exhibit 8, was over $225,000.[11] *If these figures had been accepted, their acceptance alone would have eliminated the rate increase granted under the sliding-scale arrangement.*

What the Administrator's witness, Mr. Joseph, attempted to do was to demonstrate by the use of the proper sinking-fund method that the application of an interest rate equal to the rate of return resulting in an annual depreciation allowance of approximately $120,000 would still return to the Company's investors over the estimated life of its property their full investment in the Company, whereas the use of a lower interest return, namely 4%, computed on the reserve, resulted in giving to the Company a substantial return over and above the rate of return specifically provided for in the sliding-scale arrangement as the basis upon

[11] The claim under the sliding-scale arrangement was $348,070 and the proper allowance as testified to by Witness Joseph was $120,732.

which rates shall be increased or decreased.[12] As the witness explained (R. I, 161):

> As is shown by the exhibit itself, this amount is that which, if set aside annually for a period of 43 years[13] will, when compounded at an annual interest rate of 6½ per cent equal $26,000,000 [depreciable property shown in the rate base under the sliding scale, R. 163] at the end of the period. * * * In applying the sinking fund method of depreciation it is necessary to use the same sinking fund interest rate as the rate of return. Any lower rate of return would be unfair to the ratepayers; a higher rate of interest, if used in the sinking fund calculation would be unfair to the company.

A further factor indicates the validity of witness Joseph's position as a matter of law. Under

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[12] The position advocated by the Administrator's witness in this case is a basic principle of rate making. See *Report of the Committee on Depreciation, National Association of Railroad and Utility Commissioners* (1943), the summary of which states the following conclusion (p. xix):

> 42. The sinking-fund method may sometimes be used in rate making when it is impracticable to determine the accrued depreciation. When the sinking-fund method is used in rate proceedings, *the interest rate employed should be the same as the rate of return which is applied to the undepreciated rate base.* [Italics supplied.]

[13] The period is derived from the depreciation rate of 2.2 percent used by the company in other connections (see R. I. 162), and is more favorable to the company than would have been the use of the 1.75 percent provided in the sliding-scale.

Section 43–315 of the District Code, *infra*, pp. 102–103, it is provided that the income from moneys in the depreciation fund when invested shall also be carried in the depreciation fund. The company has followed the practice of investing depreciation moneys in its plant. If the property earns a return of 5½, 6 or 7% the statute itself would seem to require that the consumers who provide the depreciation funds be given a credit equal to the return earned by the company on such investments. If this view of the statute is correct, the provision in the sliding-scale agreement calling for the use of a 4% rate is unlawful and must be held inoperative in the determination of proper depreciation expense.

The correctness of witness Joseph's position is established by the decision of this Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 595–596. There the Federal Power Commission had found that where an undepreciated rate base is adopted as the rate base "unjust enrichment of the companies at the expense of the consumers is a most likely result" unless the interest rate in computing depreciation expense and the rate of return are the same.[14] The Company there claimed that it should be allowed an annual amortization or depreciation charge of $5,100,732, but the use of a higher inter-

[14] See 2 F. P. C. Rep. 218, 230.

est rate and certain other factors resulted in the approval of an annual allowance of but $1,557,582. This Court upheld the Federal Power Commission's action.

In the instant case the Court of Appeals apparently sought to justify the Commission's refusal to consider whether the Company's profits were not in fact some $200,000 higher than as computed under the sliding-scale arrangement by construing this Court's decision in the *Natural Gas Pipeline* case as a principle applicable to a utility of a limited life (R. II, 441) but not to other utilities. The invalidity of that limitation was noted by this Court in *Federal Power Commission* v. *Hope Natural Gas Company,* Nos. 34 and 35, present Term, at p. 10.[15]

Can an end result calling for an increase in rates be valid when the method used in computing the company's depreciation expense conceals a profit to the company greater than the increase which the Commission has found to be necessary? Surely no hearing can be regarded as full or fair in which evidence bearing on so decisive a question is first rejected by the Commission and, when later equivocally admitted, is quite evidently accorded no consideration.

[15] Judge Soper, who wrote the majority opinion in the Court of Appeals in the instant case, joined with Judge Parker in the majority opinion in the *Hope* case, *Federal Power Commission* v. *Hope Natural Gas Company,* 134 F. (2d) 287, in the Circuit Court of Appeals for the Fourth Circuit.

b. The inquiry into the rate base was improperly restricted

The limitations of the hearing also prevented a determination whether the base upon which the rates were computed did not afford the company an unreasonable return, thus placing an undue burden upon the rate payers.

It will be recalled that the rate base under the arrangement was an undepreciated base. Normally, in that situation, a sinking fund method of depreciation accounting is used, whereby it is unnecessary to fix the amount of accrued depreciation, the interest on the accumulating reserve being used to build up the balance. See Barnes, *Economics of Public Utility Regulation* (1942) 267–268, 272. Under the sliding-scale arrangement, however, credit is given at a rate of 4 percent on the depreciation reserve, and it is therefore of critical importance that this reserve shall have been accurately determined. Since the company at least until [redacted] maintained a consistent policy of paying excessive dividends on its common stock instead of providing sufficiently for depreciation expense, its reserve cannot be taken as a proper measure of accrued depreciation.[16] Assuming that Commissioner Hankin has estimated with a substantial degree of accuracy the proper figure to be $5,789,970,[17] the rate payers are being

[16] See note 1, p. 10, *supra;* pp. 87–88, *infra.*

[17] *In re Washington Gas Light Company*, Order No. 2682, November 8, 1943, p. 37.

deprived of an annual credit of approximately $350,000, while receiving a credit of but 4% on a current reserve of approximately $2,300,000, or $92,000. The company is thus being unjustly enriched by over $225,000 for the year.[18]

The rate-base issue raised a further question whether, in determining the right of the company to an increase under wartime conditions, the base should not be limited to the original cost less depreciation, or, at the least, whether consideration should not be given to the fact that the company was obtaining a return on a base over and above the original cost by the use of the sliding-scale rate base. An inquiry into this aspect of the case bore directly upon the issue of hardship between the company's customers and the company. The Commission not only flatly refused this request, but even denied the right of its then Chairman to question a company witness on this issue. (R. I, 96, 97.)

While the Administrator's reasonable request was rejected by the Commission because it limited the hearing to the sliding-scale arrangement, it accepted, without qualification the argument of company counsel that the granting of the request would involve a revaluation and the making of

[18] 6% on $5,500,000 is $330,000. The annual credit on the reserve was about $92,000. Note that the conclusion is borne out in another way by the analysis of witness Joseph. Ex. 8, R. II, 420; see p. 41, *supra*.

reproduction cost appraisals. The Court of Appeals not only fell into the same error but went so far as to conclude that the request of the Administrator on this point was contrary to the Commission's statute because of a provision of the District Act that the Commission shall value the property of every public utility in the District at the fair value at the time of the valuation (Par. 7, *infra* p. 102). Even if Judge Soper's apparent view that "fair value" should be gauged by reference to reproduction cost were still correct, nevertheless neither the statute nor the principles of utility rate making would preclude the Commission from measuring the company's need for a rate increase in an emergency period by reference to the return earned on original cost of its properties.

c. Data as to future operations were not considered

Under the sliding-scale arrangement the determination of the rates is predicated solely upon the past year's operations without any consideration of operations in the future. While the Commission did go outside the record to show in its opinion (R. I, 51) that earnings on the Company's common stock for the year ending July 31, 1942, had fallen, it steadfastly resisted the efforts of counsel for the Administrator to show the improvement in the company's prospects, and both the Commission and the court below, in appraising the company's needs, ignored favorable factors of

demonstrable relevance and importance. To show that improvement in business will offset any need for higher rates which may be indicated by the past year's data is to give recognition and effect to wartime conditions and the exigencies of stabilization.

When, for the purpose of demonstrating that the company's operations were on the upward trend, counsel for the Administrator attempted to obtain access to the company's budget containing its estimates of income and expenses for the full year 1942, the company denied his request (Tr. 821). The budget estimate was particularly important in view of the fact that the Commission staff had accepted a stipulation sponsored by the company's treasurer that no accrual had been made for excess profits taxes in 1942 and that it was not "anticipated that such tax will have to be paid for the current year 1942" (Tr. 808).

The Administrator had contended that upon the basis of the record the company's earnings would continue at such a high level that it would be also subject to an excess profits tax for 1942 and that under those circumstances a rate increase would be clearly inflationary. The Commission ignored this contention and said (R. I, 49):

> The record indicates that the Company will not be liable for excess profits tax for the year 1942.

The error of the Commission's conclusion on this point was admitted by the company in its brief

opposing the granting of the petition in this case."[19]

The Commission failed to consider the fact that the company's own report to its stockholders disclosed that the earnings of the year under consideration would have been larger had it not been for the abnormally mild weather (R. II, 384). This report stated:

> * * * Although some factors other than the temperature variation may have contributed to the diminished use of gas by the average consumer, there is no doubt that if 1941 had been colder, say at the normal average of 45 degrees during the months in which house heating is required, *the gas sales and the earnings of the company would have been larger.* [Italics supplied.]

It has been customary in fixing gas rates to give effect to temperature variations in determining the revenues and income of a gas company for a given year. For example, in *Los Angeles Gas & Electric Corp.* v. *California Railroad Commission,* 289 U. S. 287, this Court sustained the use of average temperature as a basis for a rate reduc-

[19] "In its 1942 order the Commission included a provision to the effect that if any portion of the rate increase should result in the payment of excess profits taxes by the Company, such part of the rate increase should be refunded to the gas customers (R. I, 49). Because of the operation of this provision, early in 1943, the Company refunded to its customers all of the rate increase which was billed between the date on which the rates were put into effect, November 16, 1942, and December 31, 1942." (Brief in opposition, p. 9, n. 11).

tion. If the use of average temperature was proper under peacetime conditions, certainly under wartime conditions an abnormal decline in income due to temperature variation should not constitute the basis of a rate increase.

Moreover, the record also disclosed that the company's revenues for the first seven months of 1942 were approximately $700,000 higher than for the previous year (R. II, 383). Thus, even with the abnormally lighter winter, the increased business of the company enabled it to absorb all cost increases, including higher wages, with the exception of part of the higher federal income taxes payable under the 1942 federal income tax act (Tr. 827–828) if indeed, this increase may properly be considered a "cost increase" (see pp. 89–96, *infra*).

d. The Commission refused to consider what was a proper wartime rate of return

The limitation of the scope of the hearing to the sliding scale arrangement deprived the Director and the Administrator of an opportunity of demonstrating that the rate of return realized by the company was ample. Under the conditions prevailing in 1935 a basic return of 6½% including all taxes may perhaps have been reasonable, if not unduly liberal, for a gas company operating in the District of Columbia. But in 1942 the question was whether a basic return of 6½% after all expenses, including war taxes, was proper in the light of wartime conditions, the stabilization pro-

gram, and wartime sacrifices expected of the nation. This question could not be answered by a mere reference to the arrangement agreed upon in 1935. This Court has recognized changed economic conditions as a vital factor in rate making and in rate of return. (See *United Railways and Electric Company* v. *West* (1929), 280 U. S. 234, 249; *Atchison, Topeka & Santa Fe Railway* v. *United States*, 284 U. S. 248.)

Nor does the argument that the Commission did not in fact allow the Company a full return of 6½% satisfy the obligation of the Commission here. A strong case could be made that a return even of 4% would not be so unreasonably low as to justify a rate increase under wartime conditions (see pp. 80–82, *infra*). Actually, a full hearing would have disclosed that the company was earning more than 6½%.

B. THE COMMISSION AND THE COURT OF APPEALS MISCONSTRUED THE PURPOSE AND NATURE OF THE ADMINISTRATOR'S REQUESTS

The court below reversed the judgment of the district court under the mistaken view that the issue was whether the Commission, as the regulatory body, or the Price Administrator, as intervenor, should control the scope of the investigation. No such issue was involved. The petitioners urged that a further inquiry into the basic elements of the formula approved by the Commission in 1935 was now necessary to determine the pro-

priety of a rate increase, and that such an inquiry would demonstrate the highly relevant fact that the company's profits were substantially greater than as computed by either the company, the Commission's staff or the Commission itself in its order of October 13, 1943.

The court also justified the refusal of the Commission to open up the hearing by envisaging a full-scale rate proceeding of great complexity, involving "laborious calculations and studies" (R. II, 441).

Chairman Flanagan had accepted the argument of company counsel on this point, and in limiting the scope of intervention stated (R. I, 122):

> To question a basic element of the arrangement at this time would undoubtedly result in throwing open all other elements of the arrangement for reconsideration.

We do not concede that it would have been impracticable for the Commission to have carried out all the inquiries specifically requested. If, however, that had been the case, there was an obligation on the Commission to suggest, at least, some reasonable qualifications. There is nothing inherently impracticable in accompanying a determination of rates under the sliding-scale arrangement with an investigation into some or all the aspects of the plan. Indeed, the Commission itself has subsequently deemed it practicable to reconsider the rate of return without reexamining

all other elements in the arrangement.[20] In the light of these considerations and the specific requests made by the Administrator, Justice Miller aptly described as "camouflage" the argument based on asserted administrative impracticability.

The suggestion of the court that the Price Administrator made no definite offer of proof in connection with these matters is also in error. Within the very few weeks that he was in the proceeding, he presented three capable witnesses (R. I, 151, 158, 169). In addition to two technical experts in his employ, the Administrator offered as a witness one of the principal technical experts in the employ of the Federal Power Commission, who had been loaned to the Administrator for the purposes of this proceeding. Had the Commission shown a desire to be assisted by the Administrator, highly qualified witnesses would have been made available.

Of course, the Administrator did not produce "laborious calculations." If by laborious cal-

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[20] See the Commission's Order of April 2, 1943, reading as follows:

"A sliding scale arrangement for fixing rates of the Washington Gas Light Company was established by Order No. 148 of the Commission (Findings Nos. 1 and 2). Under the arrangement, rates are to be adjusted as of September 1 of each year.

"It is ordered:

"SECTION 1. That an engineering and accounting investigation be made, in conformity with the sliding scale arrangement hereinbefore referred to, relative to the rates, tolls,

culations are meant those involved in the hypothetical reproduction cost appraisals incidental to the determination of fair value under *Smyth* v. *Ames*, the Administrator, to be sure, had no such data. But as the record discloses, he possessed substantial evidence dealing with the financial history of the company, with the treatment of war taxes under wartime rate regulation, and with the proper depreciation charge of the company (R. I, 151–178). Practically all such evidence was ignored by the Commission.

The Commission's failure to broaden the scope of its inquiry was attributable to its overestimate of the administrative difficulties arising from the requests of the Administrator. In reversing an order of another administrative agency in a comparable situation, this Court said in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 198:

> The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here

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charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective on September 1, 1943.

"SECTION 2. *That an investigation be made relative to the rate of return to be allowed the Washington Gas Light Company* on its property used and useful for the convenience of the public, under the provisions of the sliding scale arrangement.

"SECTION 3. That notice be hereby given of the intention of the Commission to hold a public hearing on the subject matter of the investigations." [Italics added.]

again we must avoid the rigidities of an either-or rule.

and at p. 197:

> All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.

C. NEITHER THE PUBLIC UTILITIES ACT NOR THE COMMISSION'S RULES JUSTIFIED THE ARBITRARY LIMITATIONS UPON THE HEARING

The District Act does not support the limitations imposed by the Commission on the hearing. Paragraph 18 of the Act, *infra*, pp. 103–104, authorizing the sliding-scale arrangement, expressly reserves to the Commission continuing regulatory power to make further changes in rates and charges as well as the right to alter and amend all orders relative thereto. This reservation of the Commission's regulatory power was sufficiently broad to encompass the demands of the Administrator (D. C. Code, sec. 43—217):

> The Commission shall ascertain, determine, and order such rates, charges, and regulations and the duration thereof, as may be necessary to give effect to such arrangement, *but the right and power to make such other and further changes in rates, charges, and regulations as the Commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the Commission*

notwithstanding any such arrangement and mutual agreement. [Italics added.]

As the district court held in 1941 in *Potomac Electric Power Company* v. *Public Utilities Commission,* Equity No. 53475, the Commission's duty to fix reasonable rates is a continuing one, notwithstanding a sliding-scale arrangement. The court there held:

> Correspondingly the duty of the Commission is a continuing duty. Neither a court decree nor an agreement can deprive the Commission of that power or absolve it from that duty.

And the Commission has held in connection with the Potomac Electric Power Company sliding-scale arrangement that it "may at any time rectify errors or omissions." [21]

The Commission does have authority by its statute to adopt reasonable rules and regulations governing its hearings (D. C. Code, sec. 43–202). But the power to adopt such rules and regulations does not free the Commission of its dominant responsibility under its statute, as described above, nor can it render meaningless the Act of October 2. The procedural rule-making power cannot be used to justify an increase in rates without adequate consideration of wartime conditions and the relevant data sought to be presented by petitioners, as statutory intervenors. The Commis-

[21] Potomac Electric Power Company, Order No. 2000, February 4, 1941, P. U. C. No. 3261, Formal Case No. 296.

sion is an agency of Congress. It could not adopt regulations which would defeat its obligation to enforce and carry out both its own substantive obligations and those imposed by another act of Congress.

Finally, it should be noted that the Commission actually did go beyond the sliding-scale arrangement. It made an adjustment of federal income taxes in the light of wartime conditions. The Commission was right—as far as it went—in so doing. But the Commission cannot assert its power to make one departure from the sliding-scale arrangement, and at the same time insist that the sliding-scale arrangement precludes it from considering any matters beyond the arrangement's terms.

III

By Virtue of the Commission's Responsibility To Establish Just and Reasonable Rates, and in View of the Wartime Stabilization Program, the Commission Was Under a Duty To Refuse To Grant Any Rate Increase in the Absence of a Clear Showing That the Increase Was Necessary To Relieve Hardship Threatening the Supply of Essential Wartime Services or to Avoid Confiscation. The Commission Was Under a Like Duty by Virtue of the Stabilization Act of October 2, 1942

A. The Problem of Utility Rate Increases in the Stabilization Program

Before the effect of the wartime stabilization program on the standards governing the Commis-

sion's rate-making duties can be appraised, it is necessary to inquire into the economic relation between increases in utility rates and the problem of wartime stabilization. As was conceded in Point I of this brief, not all rate increases are necessarily inconsistent with stabilization. While the financial status of the utility seeking a rate increase was there indicated as significant in discriminating between the inflationary and the noninflationary increase, no effort was made to explore the problem at that point.

It is important to note the special problem which the development of the stabilization program has introduced in the broader problem of inflation control. In the early days of price control, before the enactment of the Price Control Act, the imperative task of the Price Administrator was to stop speculative rises in the prices of commodities under sudden demand,[22] while allowing the orderly readjustment in prices accompanying the conversion of a peacetime into a wartime economy.[23] At such a time the increase

[22] "Actual shortage" was listed 24 times and "heavy forward buying" 10 times in a compilation of major causes of price disturbances among the 33 commodities for which price ceilings had been set as of July 10, 1941. See *The Activities of the Price Stabilization Division and the Office of Price Administration and Civilian Supply*, Hearings before the House Committee on Banking and Currency on H. R. 5479 (Price Control Bill), 77th Cong., 1st Sess. (1941), Pt. 1, p. 277.

[23] "So necessary was the expansion of output to our defense in the period prior to December 7, 1941, and to the

which is inflationary is the sharp, dislocating increase which comes when shortages in supply coincide with intense demand. When, however, the economy approaches capacity production, price can no longer be trusted as an automatic mechanism allocating resources to war needs. Inflationary pressures begin to appear throughout the entire economy, though it may have attained a precarious balance. It then becomes imperative to keep price changes to a minimum. This is the function of a stabilization program.[24]

Naturally, such a program cannot be confined to commodity prices. Those prices influence, and are influenced by, wages and salaries and the rates of common carriers and other public utilities. Moreover, the objective of the program is stability of the economy, not inflexibility of individual prices, rates, and wages. Some prices, some wages, and some rates must be allowed to increase, in the

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successful prosecution of the war since that date, that the Office felt impelled to err in the direction of laxity rather than in the direction of rigor. * * * For the future, economic stabilization requires a more rigorous policy." Office of Price Administration, Third Quarterly Report (for the Period Ended October 31, 1942), pp. 16, 17.

[24] "To stabilize prices in an economy the whole of which is under general inflationary pressure involves holding them steady against any and all increases even though it may not be apparent that such increases have been brought about by inflationary pressure or that they will in their turn tend to increase such pressure upon the prices of other commodities." *Philadelphia Coke Company* v. *Bowles, Price Administration*, Emergency Court of Appeals, No. 47, decided December 15, 1943, pp. 3–4.

interest of obtaining essential production. Failure to relieve such pressures may mean a loss in total national production or losses in certain fields which are important to the war effort. Yet to relieve the tensions, even by minimal price or wage increases, will, of course, tend to accentuate the difficulties of still other producers or, by increasing the cost of living, of still other employee groups.

Since ground must be yielded, it becomes important to yield as little as possible. This means that price, rate, and wage increases must be absorbed whenever and wherever possible. That economic necessity has been stated in terms of legal duty by the Emergency Court of Appeals in an opinion which constitutes a fundamental contribution to the literature of wartime economic control. Responding to the contention that increased coal costs should be transmitted by complainant coke producers to their own customers in the form of higher prices, Judge Maris, writing for the court, said:[25]

> * * * It will unquestionably be necessary for the Administrator in carrying out the enormous task assigned to him to authorize increases here and there in the price structure from time to time as he has done in the case of bituminous coal. These increases may become necessary in order to

[25] *Philadelphia Coke Company* v. *Bowles, Price Administrator, supra*, at pp. 8–9).

> stimulate the production of some commodities in the quantities required by the nation or in order that the price regulations applicable to other commodities may continue to be fair and equitable in the light of changing costs and profits. * * * *Consequently, when such price increases are permitted it is the duty of the Administrator so far as possible to require them to be absorbed at some appropriate intermediate stage in the process of production and distribution at which there may be an existing margin of profit reasonably sufficient to absorb them.* [Italics supplied.]

Perhaps the commonest reason for failure to apprehend this basic proposition is adherence to the criteria applicable during the early stages of price control. Justification for small increases in price which represent only a passing on of cost increases is asserted on the ground that such increases are not "inflationary." To be sure, they are not inflationary in the sense that the skyrocketing price of second-hand machine tools in 1941 was inflationary, but they are destructive of stabilization, and certainly that is inflationary. The fallacy of the thesis that small increases which could have been absorbed are not inflationary has never been more aptly exposed than in the opinion of Chief Judge Vinson of the Emergency Court of Appeals in *Lincoln Savings Bank v. Brown, Price Administrator,* where he said (p. 231):[26]

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[26] 137 F. (2d) 228, decided May 7, 1943.

> A substantial price increase of any commodity will not, in itself, add appreciably to the living costs of the general public. Its weight is milligramic. But the combined effect of millions of these minute quanta, which singly would not shake the scales, could be catastrophic.

It is difficult to believe that the majority of the court below gave full weight to this admonition when it remarked: "Certainly the risk of such inflation as might be expected to follow from an increase of 1/37 of 1 per cent in the cost of living in the District of Columbia was amply justified" (R. II, 438–439). Instead the tenor of its observation accords with that of the Interstate Commerce Commission in authorizing a fare increase for the Hudson & Manhattan Railroad over the protest of the Director and the Administrator who intervened in a suit for injunction instituted by Jersey City. The Commission said:[27]

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible.

The Commission's order was enjoined as in disregard of the stabilization program, Judge Mc-

[27] Order of June 8, 1943, 255 I. C. C. 649, 668.

Laughlin, writing for the majority of a statutory three-judge court, quoted this passage and then continued:[28]

> The Commission * * * simply having in mind the small amount in money the increase meant to each passenger taken alone, dismissed this phase of the matter as negligible. We do not see that there was ever any claim by the Director of Economic Stabilization that the raise in rates here by and of itself would result directly in inflation. The gauge urged on behalf of Director Vinson was that set out in *U. S. Gypsum Co.* v. *Brown,* 137 F. 2d, 360, where the United States Emergency Court of Appeals, speaking through Chief Judge Maris said at page 364:
>
> "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral."

If the Price Administrator were to act on the supposition that little risk of inflation is hazarded by increases of $\frac{1}{37}$ of 1 percent in the cost of living, his temptations to yield ground would be

[28] *City of Jersey City, Plaintiff, Vinson, Economic Stabilization Director, and Bowles, Price Administrator, Intervenors* v. *United States Interstate Commerce Commission and Hudson & Manhattan Railroad Co.*, Civil Action No. 3073, U. S. Dist. Ct., N. J., decided January 12, 1944, *supra*, p. 31.

many. Consider, for example, the number of foods included in the Bureau of Labor Statistics Cost of Living Index for the District of Columbia for November 1943, with weights so low that even a 10-percent increase in the price of any one of them would increase the cost of living by less than $\frac{1}{37}$ of 1 percent. There are twenty-two such products: whole wheat bread, rye bread, soda crackers, macaroni, corn meal, rolled oats, veal cutlets, sliced ham, salt pork, pink salmon, bananas, cabbage, onions, canned peaches, canned pineapple, canned green beans, canned corn, dried prunes, tea, shortening (other than lard) in containers, oleomargarine, corn syrup.

Unremitting effort is devoted by the Office of Price Administration to the control of the prices of these commodities. A 10 percent price increase for any one of them would arouse lively concern; no one would take comfort in the thought that the increase raised the cost of living less than $\frac{1}{37}$ of 1 percent. Stabilization is in danger if a different view is allowed to prevail in any other agency which shares in the responsibility for its maintenance.

In the field of utility rates, this danger can be most insidious, for utilities would be the most likely to benefit if tolerance of the small increase went unchecked. In absolute amount, the added charge imposed on each consumer does not seem large, and it is distributed more or less evenly

over the entire year. Since increases must secure the assent of regulatory agencies, they will be most frequently sought in amounts which, percentagewise at least, are small. But the cumulative effect of such increases in utility rates may be serious. The aggregate gross revenues of the electric light and power companies and gas companies constituted $3,850,000,000[29] in 1942, and this total has been exceeded in 1943. Applied to the 1942 revenues, an increase of only five percent would amount to nearly two hundred million dollars. A great many million more could be added if the calculation were extended to telephone, water and heat companies, and to common carriers.[30] Furthermore, these figures disregard increases in the prices of other commodities and

[29] Source: for electric light and power and manufactured gas: Moody's Public Utility Manual for 1943; for natural gas: Survey of Current Business, U. S. Department of Commerce (1943).

[30] The problem of common carrier rate increases remains a real one, despite the unprecedented profits of the railroads. Although the carriers did not take advantage of the Interstate Commerce Commission's order of October 7, 1943, to show cause why the suspension of the 1942 rate increase of 6% should not be extended through June 1944, still it must be remembered that, influenced by the view that the rail carriers are entitled to recoup their depression losses in wartime, five of the eleven members of the Commission voted against the suspension when it was ordered in April 1943 (*Ex parte No. 148, Increased Railway Rates, Fares, and Charges, 1942*, 255 I. C. C. 357). Moreover, a significant proportion of the thousands of notices of carrier rate increases received by the Administrator come from rail carriers.

services to which increases in utility rates contribute.

B. THE COMMISSION'S DUTY TO FIX JUST AND REASONABLE RATES UNDER THE PUBLIC UTILITIES ACT

If the analysis of the problem of utility rate increases in the stabilization program is accepted, it becomes clear that the effectuation of that program requires the denial of all unnecessary rate increases. Since, by the statute declaring its power, the Commission may fix only just and reasonable rates,[31] it would constitute an error of law for it to authorize an unnecessary increase in an existing rate which is not shown to be unjust or unreasonably low.

In Point IV, *infra*, pp. 78–96, the question will be considered whether there was substantial evidence of record to sustain a finding that the rate increase the Commission ordered was necessary. But before that inquiry is undertaken, further consideration must be devoted to what may possibly seem a severe conception of the Commission's wartime legal duty.

The canon of necessity is a strict one. In all but exceptional cases, necessity can be found only where real hardship is shown. If a company is threatened by inability to maintain needed service, or if, despite a recognition of wartime exigencies, a court would be forced to conclude that

[31] District of Columbia Code (1940 ed.), §§ 43–301, 43–414. *infra*, pp. 102, 104–105.

the company's property is being confiscated, or if a company, though able to maintain existing services, is too hard pressed financially to be able to supply added wartime demands for its service, necessity properly may be found. And, since discrimination is incompatible with the basic obligation of the public utility, necessity for an increase may be found in those infrequent cases where an unjustifiable discrimination cannot be corrected by reducing the higher rate.

While the criterion of necessity may be susceptible of still further refinement, petitioners submit that the most effective formulation is that to be derived from the Act of October 2 itself. In describing the circumstances in which the President may adjust prices and wages stabilized at September 15 levels, Section 1 declares that he may do so only "where necessary to aid in the effective prosecution of the war or to correct gross inequities." The very applicability of those statutory standards to virtually all prices of commodities and services and to wages and salaries reinforces both the importance and the justice of recognizing that like standards inhere in the concept of just and reasonable rates in wartime.

The justice of applying the same standards to utilities becomes all the more evident when note is taken of the fact that utilities are peculiarly the beneficiaries of successful stabilization. This fact is convincingly attested by the plight of the utili-

ties during and immediately following the First World War.[32] In 1917 and 1918 there was sharp and sudden rise in the prices of commodities and services which the utilities had to buy. In particular, the cost of oil, coal, and labor soared. The situation became critical; the War Finance Corporation, the chief source of capital, was embarrassed by its inability to lend upon the inadequate security afforded by utilities unable to earn enough to pay fixed charges, taxes, maintenance, and repairs. The Secretary of the Treasury in a letter to the President dated February 15, 1918, stated that many public utilities needed prompt help, and the President in reply endorsed this position.

Appeals by distressed utilities to regulatory authorities for emergency aid were many. This was generally given, after the usual lag, but it is of interest to note that the rate of return allowed was not the normal one. Examples of this position are numerous. Thus the Supreme Court of Utah declared:[33]

> It is therefore of the utmost importance that the commission should proceed with great care in changing rates. While caution in that regard should be exercised, yet at this time, when the whole world is en-

[32] The report of World War I experience in the text is derived from *In re Empire Gas & Electric Co.*, PUR 1918D 916–17 (N. Y. P. S. Comm. 1918).

[33] *Salt Lake City* v. *Utah Light & Traction Co.*, 52 Utah 210, 228–229, 173 Pac. 556 (1918).

> gaged in a most destructive war and every condition is grossly abnormal, to do so is of special importance. While, generally speaking, every utility that serves the public must be allowed a fair and reasonable return on its investments over and above the actual cost and expense of providing adequate, efficient, and safe service when economically managed, yet it is not true that such a return must be assured to every utility when, as now, the conditions are grossly abnormal on account of the war and while such conditions are necessarily temporary.

And in granting an emergency increase the New York Commission said:[34]

> This certainly will not yield as large a return as might be reasonably expected in normal times. * * * We think, however, that the public-service corporations must and do expect to submit to their share of the common sacrifice and that neither the appeal of President Wilson nor the ruling of the War Finance Corporation had in view the maintenance in all cases of normal profits.

The contrast is marked between the distress that was endemic among utilities in the previous war

[34] See note 32, page 68, *supra*. Similar views were expressed in several other cases involving war emergency rate increases necessitated by the inflation in prices then occurring. *Smith* v. *Railroad Commission*, PUR 1918C 577 (Cir. Ct. Wis. 1918); *In re Queensboro Gas Co.*, PUR 1918C 872 (N. Y. P. S. C. 1918).

because of inflationary price rises, and the stability of all, and the prosperity of most, public utilities which prevails today. To require utilities to absorb the modest cost increases which must continue despite price and wage controls is to require them to take out inexpensive insurance against the upward sweep of costs which would follow if those controls collapsed.

Even though these considerations may be accepted as appropriate when addressed to the discretion of the Commission, it may be argued that they give rise to no legal duty from which departure may be corrected by a court. But this Court recognizes judicial authority to scrutinize the "total effect" of the "result reached" by commission action,[35] and, of course, the courts remain charged with the function of statutory construction. Petitioners believe that the Court will find no difficulty in characterizing as unlawful the result reached by the Commission's action in this case, once the Court has construed the standards embodied in the District of Columbia statute so as to give effect to the governmental objective now dominant: economic stabilization. This task is one which the Court is peculiarly fitted to perform. A

[35] "Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. * * * If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, at pp. 7, 8.

commission may be expert in balancing the conflicting interests of consumers and investors, but where a governmental interest transcending both those interests comes within the orbit of a commission's responsibilities, it is the judiciary which, as arbiter, must determine whether the emergence of that interest shall operate to contract the area of commission discretion.

The effect of the enactment of the Emergency Price Control Act, and especially of the Stabilization Act, is to oblige the Commission and all rate-making agencies to make a "careful accommodation of one statutory scheme to another". In such a situation, the Court remarked in *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 47, "it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." All the more is this true when the effect of the supervening legislation is to establish the basic economic conditions with reference to which the Commission ought properly to discharge its own statutory function.

In one respect, to be sure, the problem is a novel one. Characteristically, controversy in rate cases has centered on the question whether the rate is too low, and the disputants have been commissions and companies. In the infrequent situations where the consumer interest has been represented by spokesmen other than the regulatory

agencies, some courts have been hesitant to give relief. But no reasons for such hesitancy exist in this case. Here the rule would be clear-cut; if no unnecessary increase is lawful, there is no "range of reasonableness" to delimit. The interest involved is a national interest of a grave emergency character, represented in the proceedings by a duly authorized Federal agency, distinct from the local consumer interest normally represented by the municipality or regulatory authority itself. Hence the instant case does not require the Court to anticipate such problems as may spring from judicial review of administrative action at the suit of a consumer.

C. THE COMMISSION'S DUTY UNDER THE STABILIZATION ACT TO DENY UNNECESSARY RATE INCREASES

In the preceding section attention was focused upon the effect of the wartime stabilization program on the Commission's obligation under its own statute to establish just and reasonable rates. When the problem is so conceived, the Stabilization Act is important as a dominating factor in the wartime economy within which the Commission is required to act.

But the duty of the Commission to give full effect to the stabilization program need not, we submit, be derived solely by adapting the concept of just and reasonable rates to wartime conditions. The government of the nation has, in the

exercise of its war powers, adopted stabilization as its wartime economic policy. By Congressional enactment, implemented by Presidential order, it has in effect directed the stabilization of cost-of-living prices, wages, and salaries, and of common carrier and other public utility rates at September 15, 1942, levels, subject to adjustment by the President or his delegate in the case of prices, wages, and salaries, and by the regulatory authorities having jurisdiction in the case of utility rates. The question then arises whether, in thus entrusting the responsibility of rate stabilization to the regulatory authorities, the Stabilization Act itself placed them under a legal duty not to authorize unnecessary rate increases contrary to the interests of stabilization.

The consideration of this question has been confused by the fabrication and subsequent annihilation of a man of straw. It has been urged that the Congress intended to place no legal duty upon regulatory authorities by adopting the Stabilization Act (other than the duty to accord the President's representative a fair hearing) because the Act (section 2) does not confer on the President the power to suspend the provision in the Emergency Price Control Act excepting utility rates from regulation thereunder.

What seems to have been the source of the confusion is a provision which accompanied the Norris Amendment when it was adopted by the

Senate.[36] Because the President might wish to exercise the power to veto utility rate increases by delegating authority to the Administrator to proceed under the Emergency Price Control Act, he was granted authority to suspend the provision in that Act forbidding the regulation of utility rates. The President's power to control wages was accompanied by a like power to suspend the provision exempting wage rates from the Price Control Act. When, however, the Norris Amendment was rejected in conference and the notice-and-intervention procedure substituted, there was no longer any reason for the President to be given power to suspend the provisions exempting utility rates from regulation under the Emergency Price Control Act. Accordingly, the power of suspension was dropped and the exemption clause was preserved intact.

We concede that neither the President, nor his delegate, the Director, nor indeed the Administrator, has any authority to regulate utility rates under the Emergency Price Control Act or the Stabilization Act. At no time has this been attempted. Surely to appear as intervenors before a regulatory authority having jurisdiction over utility rates to contend that conformity to the Stabilization Act requires the regulatory authority to deny

[36] For the text of the bill as passed by the Senate, see 88 Cong. Rec. 7719. The provision in question appeared in section 2.

unnecessary rate increases does not make the intervenors the regulators of the rates in question.

Quite different is the question whether the Stabilization Act imposed a duty on regulatory authorities. The Act does not do so explicitly; the legislative history is not decisive; and the answer must be found by a consideration of what the Act did provide and why it did so.

Did the Act necessitate the establishment of governmental machinery for the receipt of notices of rate increases, for their consideration, and for the intervention by the President's representatives before regulatory authorities, only in order to create a sense of moral discomfiture in the latter bodies if they acted in disregard of the demands of stabilization? Such is the conception of the Act's purpose which was urged by the Commission and the Company and which was accepted unqualifiedly by the majority of the Court of Appeals. Its basis seems to be rooted in the remarks of Senator Norris on the floor of the Senate when the conference report rejecting his amendment was announced by Senator Brown.

Senator Norris was disappointed. When he said that intervention would have a "moral effect," [37] he was not expressing a view derived from any extended analysis of the substitute measure, but rather was intermingling disparagement and praise in the way of one who is deciding to make

[37] 88 Cong. Rec. 7723 (Oct. 2, 1942).

the best of an unsatisfactory compromise. His incomplete apprecation of the effect of the substitute measure is revealed by his assumption that the President's representative as intervenor would have no right to appeal an adverse decision. When Senator Brown promptly corrected this misconception, Senator Norris conceded that this "would add a great deal to the legal effect of the language which has been placed in the measure."[38]

We believe the right of appeal does indeed add a great deal to the Act, for we submit that it is a right to challenge the order of a commission which has disregarded its responsibilities under the Stabilization Act as well as its duties under its local public-utilities law.

Support for the view that Congress expected regulatory agencies to be subject to the same legal standards in passing upon rate increases as the President would be in passing upon price and wage increases is to be found in the history of the relevant provisions. The amendment introduced by Senator Norris took the form of a proviso appended to the second sentence of Section 1, which gives to the President power to adjust prices and wages over September 15 levels and which specifies as the standard to govern his action that it be "necessary to aid in the effective prosecution of the war or to correct gross inequities." However, the proviso giving him power to veto utility

[38] *Id.* at 7723.

rate increases over September 15 levels contained no standards. This was natural; the proviso merely introduced an additional subject matter, utility rates, and prescribed a different procedure, review of commission action. But the President's action under it, in permitting or vetoing rate increases, would surely be subject to the standards prescribed in the same sentence to govern his action in adjusting prices and wages.

When the conferees came to change the procedure thus provided, there was still no occasion to provide other standards. The standards to govern the President's representative in intervening would, of course, continue to be those which would have governed the President in vetoing rate increases, and, for the same reason, the same standards would be applicable to the regulatory authority which, free from the President's veto, was entrusted by the proviso with the responsibility of determining whether to allow increases in rates over September 15 levels. That the final authority was reposed in the regulatory body rather than in the President does not mean that its exercise was to be free from legal responsibility to conform to the requirements of stabilization.

That the Stabilization Act did impose a substantive obligation upon the Commission is the view of the majority of the statutory three-judge court which has recently issued a permanent in-

junction restraining the Hudson & Manhattan Railroad from putting into effect an increase in certain of its fares which had been authorized by the Interstate Commerce Commission over the objection of Jersey City and of the Director and the Administrator,[39] and repudiating the Commission's view that the increase, being small, was "unlikely to have any inflationary effect."[40]

IV

The Record Before the Commission Discloses that There Was No Need for a Rate Increase and the Order Should Have Been Set Aside on that Ground

A. The Limited Record Before the Commission Discloses that the Company's Return Was Adequate If Not Unduly Liberal in the Light of Wartime Conditions and Did Not Justify the Increase

The record before the Commission, as we have demonstrated, was incomplete, and for that reason its order could not properly be affirmed. By its restrictive rulings, the Commission precluded itself from determining the real earnings of the company or from adequately considering the relative equities of the company's consumers and investors. In addition, we submit that there was no evidence in the record upon which the Commission could have concluded that the company would be subjected to hardship or that its return

[39] *Jersey City* v. *Hudson & Manhattan R. R.*, *supra*, p. 63.
[40] See 255 I. C. C. 649, 663.

would be unreasonably low if required to continue to operate at existing rates.

The principal exhibit of the three offered by the company was exhibit No. 2 (R. I, 233–234), comparing the computations by the company's and the commission's accountants of net amount available for return. The exhibit disclosed that the net operating income as computed by the company after all expenses including all federal income and excess profits taxes was $1,366,119, or 4.87% on the sliding scale rate base. The total federal income and excess profits taxes included in the expenses by the company were $526,440. Since this was computed prior to final enactment of the Revenue Act of 1942, a subsequent computation disclosed that the revenue act as finally adopted by Congress would reduce this liability on an annual basis by $36,000 (R. I, 223–226). This item served to increase the company's net income after all expenses to approximately $1,400,000, or 5% on the undepreciated rate base.[41] It should be noted that both the Commission and the court below ignored this saving to the company, for both assumed the return on the company's figures to be 4.87%.

Exhibit 8, offered by the Administrator, first excluded by the Commission and then equivocally

[41] This increased the company's return from 4.87% to 5% for the same period, since .13% of the rate base ($28,088,332) (R. II, 420) is approximately $36,000.

admitted (*supra*, p. 40), indicated that by giving effect to the sliding-scale arrangement and making two adjustments in the company's expenses, one relating to depreciation expense and one for income taxes, the company earned a profit of $95,335 for the sliding-scale year ending June 30, 1942, over the 6½% basic return provided for in the arrangement and that, therefore, a rate reduction of half the excess, or $47,668, should have been ordered pursuant to the arrangement itself. Commissioner Hankin in his dissenting opinion, after giving effect to these and other factors, concluded that a rate reduction of approximately $1,000,000 was justified (R. II, 271, 316-317).

A return of 5% on an undepreciated rate base, it must be clear, could not produce a return which was so unreasonably low as to warrant a rate increase under wartime conditions. This Court in 1940 held that no substantial federal question was presented by a decision which held that a gas company was not suffering confiscation where its rates yielded a 5% return (*Peoples Gas Light and Coke Company* v. *Hart*, 309 U. S. 634). Such a return allowed only peacetime income taxes and did not take into consideration the reduction in return which would be justified under wartime conditions by the inclusion of all federal income and excess profits as an operating cost. In *West* v. *Chesa-*

peake and Potomac Telephone Company, 295 U. S. 662, 683, three members of this Court stated:

> There is at least grave doubt whether a return of 4½% is so out of line with the current yield on invested capital as to be deemed confiscatory. This doubt, if accepted principles be applied, must be resolved against the company, which has offered no evidence by which the doubt could be removed. Twenty-five years ago, in times far more prosperous than these, this Court unanimously declined to take judicial notice that an estimated net return of 4% would be confiscatory *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17.

The earnings of the company are considerably higher than have justified rate increases granted by other regulatory commissions. Two cases involving gas distributing companies are pertinent. In both, rate increases were denied though the utilities were earning a lower rate of return than might be considered reasonable under wartime conditions. In the *Dedham and Hyde Park Gas and Electric Company* case, 48 P. U. R. (N. S.) 257, 260, the Massachusetts Department of Public Utilities on May 17, 1943, refused an increase in rates though it appeared that the company was earnings about 3½% on its net investment. The company's financial history and current position were extremely unfavorable compared to the liberal earnings of the Washington Gas Light Company.

And the Public Service Commission of Kentucky, in the *Western Kentucky Gas Company* case, where the company contended that it had been earning only 1½% on its net investment, denied the increase in the interest of the stabilization program, holding (— P. U. R. —):

> In normal times the record made by applicant might entitle it to favorable consideration. That we do not now decide. However, times are not normal. A war emergency exists that affects the whole nation; and we do not believe that, under existing circumstances and the expressed policy of the Federal Government, an increase should be allowed in utility rates unless and until it is shown to this Commission that service to the consumer would be impaired. This record does not affirmatively or otherwise show that the service furnished to the consumer would be impaired if the application is not granted.

As we have shown, the earnings of the company in the present case were understated. Moreover, the company's increased revenues had offset by the time of the hearing in 1942 all increased operating costs with the exception of part of its higher federal income taxes, and it had every prospect of higher net income in the coming year. See pp. 49–50, *supra*.

B. THE CREDIT POSITION OF THE COMPANY DID NOT JUSTIFY THE INCREASE

After a review of the company's current financial position (R. I, 50–51) the Commission concluded that its "credit position * * * depends in large part upon the integrity of this Commission in administering the sliding scale arrangement" and that the rate increase of $201,424.74 should be authorized. This increase the Commission stated will "tend to arrest the decline [in earnings on the common stock] and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure" (R. I, 51, 52). The Commission also said (*id.* 50–51):

> On January 17, 1941, the Company filed an application with this Commission for authority to increase its capitalization by 90,000 shares of $4.25 preferred stock. Due principally to the lack of a quorum on the Commission this application was not acted upon until March 26, 1942 (Order No. 2221). At that time, *due to depressed market conditions,* the Company was unable to sell this newly created stock and endeavored to sell 40,000 shares of its $5.00 cumulative preferred stock with the result heretofore stated. [Italics added.]

While the Commission noted that "depressed market conditions" had prevented the sale of the

proposed preferred stock issue, it assumed that these conditions could be overcome by a rate increase. It ignored the fact that these conditions were not caused by the temporary decline in the company's net income after war taxes (due perhaps as much to the temporary weather factor as to any other), but by prevailing war conditions over which neither the Commission nor the company had any substantial control. It is a well recognized fact, shown by the decline in the market price of securities, both equity stocks and bonds, in the spring and summer of 1942, that this decline was the result of the unfavorable war situation. Had the Commission undertaken to determine whether a rate increase was necessary to permit needed financing, surely it would have sought evidence as to financial market prospects generally, as to the effect, if any, of a denial of the rate increase on the Company's prospects as the market became more normal, and whether an offering on more favorable terms was indicated. Far from obtaining proof of necessity, the Commission majority simply concluded that it would be advisable to cast the burden of a rate increase on the rate payers on the chance that the increase would be helpful to the financing prospects of a company which enjoyed an extraordinary record of prosperity (R. II, 421–422). It would indeed be a dangerous principle of utility rate making for regulatory commissions to assume that increases in utility

rates could overcome temporary adverse market conditions.

That there was no genuine relationship between the rate increase and the ability of the company to market its securities was soon confirmed. On February 18th, *after* the Commission's order authorizing the increase was set aside by the District Court, the company sold $4,750,000 of 3¾% refunding mortgage bonds. This sale was characterized by the Commission in a later proceeding as "advantageous refinancing." Opinion in Formal Case No. 334, P. U. C. No. 3361, Nov. 8, 1943, at p. 10.

The Commission also justified the rate increase by a reference to the decline in the company's earnings (R. I, 51). As we have pointed out, *supra,* pp. 49–50, the Commission's conclusions as to the earnings of the company [42] ignored the temporary decline of revenues due to the abnormally light winter and also ignored the fact that the revenues for the first seven months of 1942 enabled the company to absorb all increased costs including increased wages with the exception of part of the higher federal income taxes estimated payable under the 1942 revenue act (R. II, 383; Tr. 827–828).

The Commission's conclusion that a wartime in-

[42] The earning figures were applicable to the Company's entire operations including those in Maryland and Virginia. What part of the decline was due to those operations was not considered by the Commission.

crease could be justified because the credit position of the company "depends in large measure upon the integrity of the Commission, in administering the sliding-scale arrangement" means little more than that the maintenance of peacetime profits of the investors is at least as important as the requirement that the company assume a part of the burdens of the war by foregoing a rate increase. Perhaps the Commission felt that unless the investors and the company could be assured of such profits, they would go on a sit-down strike.

Not abandonment, but only a wartime adjustment in the arrangement was here in prospect. A more realistic approach to the financial position of the company would have demonstrated that its real strength lay less in the arrangement, which began in 1935, than in the monopoly of the company in rendering gas service in a territory which has produced extraordinary profits throughout its history, including the depression periods.

The significant financial history of the company, ignored by the Commission, disclosed that in 1931, the worst year of the depression, the company earned 10.6% upon a base of 18½ million dollars, as compared with the 21-million-dollar rate base fixed in the sliding-scale arrangement (R. II, 422). Between 1927 and 1934 it earned an average return of 9.2% on the average capital employed in its business after the deduction of federal income

taxes (*Ibid,*). Between 1936 and 1941, under the arrangement, it earned an average return of 6.86 (R. II, 421), upon an undepreciated rate base. It is true that the company made reductions in rates totalling approximately $328,000 during the period, but the company was also permitted under the sliding-scale arrangement to retain one-half of the earnings in excess of 6½% in the same amount. Moreover, the depreciation reserve has increased from $879,289 as of December 31, 1936, to $2,171,608 on December 31, 1941 (R. II, 421). The earned surplus of the company had increased from $5,398,927 as of December 31, 1936, to $6,271,626 as of December 31, 1941 (*Ibid.*). That the company's depreciation reserve and surplus had grown substantially in recent years seems not to have been understood by the court below (R. II, 439).[43]

Further scrutiny of the rate increase order in relation to the ability of the company to maintain its credit or market its securities discloses little if any relationship between the two. The company, if it became subject to excess profits taxes as a result of the rate increase, became obli-

[43] The Commission might also have officially noticed the following pertinent facts in connection with the financial history of the Company:

1. Of the total common stock in the amount of $3,650,000 only $2,550,000 has been paid in by stockholders in money or property on which $1,050,000 was paid in 1939 (P. U. C.

gated under the provisions of the order to refund the additional revenues (R. I, 49). The company has already refunded such additional revenues for 1942 (Brief of Public Utilities Commission in opposition to certiorari, p. 9, n. 4). Even if it will not be required to refund additional revenues for 1943, its liability for federal and state taxes on the additional income will leave the company only about half the increased revenues. If a rate increase bore a substantial relationship to the ability of the company to sell securities, the Commission, it would seem, should have given the company an increase amounting to many times that granted by the Order of October 13. These implications of respondents' argument repel its acceptance.

Order No. 1341, March 19, 1935 (Tr. 128–129), pp. 1, 2; Order #2682, p. 36, n, 46, November 8, 1943).

2. In 1874, the extra cash dividend was one of 50%, or $750,000 on the then $1,500,000 of outstanding stock. This dividend was repeated in 1876, and, in 1883, one of 40% or about $800,000 was paid. In 1891 the extra payment amounted to $600,000, and in 1893 and 1895 a total of $700,000 extra was disbursed. The total of extra cash dividends was $3,600,000. (P. U. C. Order No. 209, pp. 9–12, May 2, 1917.)

3. The common stockholders also received $2,600,000 in gold bonds as a bonus. (P. U. C. Order No. 209, p. 13; Order #1341, March 19, 1935 (Tr. 128), p. 1; Order #2682, Nov. 8, 1943, p. 36, n. 46).

4. From 1865 through 1908 regular dividends on the common stock averaged 10%; in 1909 they were 20%, in 1910, 15%; 1911 through 1916, 24%; in 1917, 22½%; 1918 through 1933, 18%; in 1934, 22½%; 1935 through 1937, 18%; in 1938, 19½%; in 1939 (on the basis of $3,650,000 capital stock) 16¾%; 1940 through 1942 (on the same basis) 18%. The total was $30,317,500. (Order #209, *supra*, p. 11; Order #1341, *supra*, p. 1; Order #2682, *loc. cit. supra*).

C. THE MERE DISALLOWANCE BY THE COMMISSION AS AN IMPROPER OPERATING EXPENSE OF INCOME TAXES COMPUTED AT CORPORATE INCOME TAX RATES ABOVE THOSE IN EFFECT FOR 1941 DID NOT JUSTIFY THE INCREASE, OR CONSTITUTE GIVING ADEQUATE EFFECT TO THE STABILIZATION PROGRAM

To give due consideration to the effect of wartime taxes in passing upon the right of a utility to increase rates during the war, the Commission should have either (1) reconsidered the rate of return in the light of the stabilization legislation and the changed economic conditions, recognizing the absorption by the customers of the wartime taxes of the company if allowed as an operating cost, or (2) disallowed all war and emergency federal income taxes as an operating cost. A somewhat higher rate of return would probably be justified in the latter than in the former case. As we have demonstrated, the Commission refused to reopen the question of rate of return. Had it done so, it could have considered the effect of the allowance of war emergency taxes as an operating expense. Instead of adopting the course suggested by the Administrator and Director, the Commission held that it would give adequate effect to the government's wartime program to keep down the cost of living by excluding as an operating cost all excess profits taxes, and income taxes of the company over and above those based on the Revenue Act of 1941 (which established a corporate tax rate of 31%). The Court of Appeals apparently concluded that the Commission thereby demonstrated

that it was not "oblivious to the economic conditions consequent upon the war and did not disregard them in formulating its findings and opinion" (R. II, 435).

To the extent that federal income taxes constitute an element of allowable operating expense, the commission should not have allowed income taxes in excess of those based upon the highest corporate tax rate which prevailed through the 1936–1939 period, or 19%. This, as we shall show, was the maximum allowance that should have been made in order that the company might bear its proportionate part of the burdens of the war and in order that unfair treatment of the company's consumers might be avoided.

It is clear that all revenue acts adopted by Congress since 1939 have been heavily weighted by the extraordinary expenditures incurred for the defense of the nation. The reports of the Committee on Ways and Means of the House of Representatives relating to each of the revenue acts from 1939 to 1943, inclusive, demonstrate that the proper line between emergency and prewar taxes is in 1939 and not 1941 as held by the Commission. In recommending the 1940 Revenue Bill, which provided for an increase in the rates from 19% to 24%, the Committee stated: [44]

> The Committee on Ways and Means, to whom was referred the bill [the Revenue

[44] Report No. 2491, 76th Congress, 3rd Sess., H. R. 10039 (Rev. Bill of 1940, p. 1–3).

Bill of 1940] to provide for the expenses of national preparedness by raising revenue and issuing bonds, * * *

* * * * * * *

* * * It is the desire of this committee, which is favorably reporting a bill which will enable a larger proportion of our citizens to participate in the responsibility of providing an adequate national defense than has ever been the case before, that there shall not be an opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons because of the rearmament program.

Congress thereby definitely expressed its intention that all citizens and corporations should assume their proportionate financial responsibility for providing for the national defense. The passing on of war and emergency taxes to utility consumers means that the consumers and not the utility would assume such taxes. And the Ways and Means Committee stated with respect to the 1941 revenue act:[45]

> The bill is unprecedented in the amount of revenue it is designed to provide. It lays a substantially increased burden upon the American people. But there is convincing evidence that this burden will be borne cheerfully in the light of the overwhelming importance of national defense to the contin-

[45] Report No. 1040, 77th Congress, 1st Sess., H. R. 5417 (Rev. Bill of 1941, p. 1-2).

> ued freedom and security of the United States. * * *
>
> In its deliberations on this measure, it has been your committee's aim and desire to distribute the additional tax burden as equitably as possible among the several classes of taxpayers.

It is clear that the 1940 and 1941 Revenue Acts providing for higher tax rates were enacted as a result of the greatly increasing expenditures arising out of the war. On the other hand, the national emergency did not affect the provisions of the 1939 Bill.[46]

The inflationary character of allowing federal income taxes as an operating expense was clearly demonstrated by the Price Administrator's witness Riley (R. I, 151) who testified that it was the practice of the Administrator to consider profits before federal income taxes in determining the reasonableness of maximum prices under the stabilization legislation. In his testimony, he asserted (R. I, 155):

> In the case of income taxes and excess-profits taxes, the Congressional intent is the reverse; by their very nature they are in-

[46] "The bill has two major objectives. The first is to remove from the existing corporate income-tax structure such business deterrents and tax irritants as may be possible to consider at this time. Its second purpose is to extend the temporary excise taxes and postal rates." (Report No. 855, 76th Congress, 1st Session, H. R. 6851 (Revenue Bill of 1939, pp. 1–2).)

tended to be paid by the person to whom they are assessed and not to be passed on through higher prices. To include them in cost would place the Price Administrator or any other agency or price or rate control in the impossible position of sanctioning an increase of prices whenever the burden of taxation was increased. No more deliberately inflationary policy could be adopted.

The policy of including income taxes in business costs would have serious effects going far beyond the direct raising of prices. If corporate incomes are to be increased by the amount of additional taxes, individual incomes should be accorded the same treatment. Business and government salaries should be increased by the amount of additional income taxes. The War Labor Board formula should be amended to provide that wages shall rise to cover the workers' additional income taxes! We should all share in the remarkable privilege of passing on our war taxes to others![47]

Moreover, in determining costs under wartime contracts, the War and Navy Department instructions provide:

Among the items which shall be excluded as a part of the cost of performing a con-

[47] This position is strongly corroborated in a letter of Chairman Ayres of the Federal Trade Commission, dated September 15, 1942, stating that the practice of including income taxes in costs would "set up a vicious spiral", and calling attention to its "inflationary character". 88 Cong. Rec. 7634–7635 (September 30, 1942).

> tract or subcontract, or considered in determining such costs, are the following: * * * Federal and State income and excess-profits taxes and surtaxes; * * * (Treasury Decision 5000, § 26.9 (g) (4), 5 F. R. (1940) 2793)."[48]

Likewise, the general commercial practice is not to consider income taxes as an element of cost in the determination of the cost of production."[49]

It is true that this Court held in *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, that federal income taxes are properly chargeable as an operating expense for a public utility in determining the issue of confiscation. But this decision should not be construed as imposing an obligation upon state and federal utility agencies to require consumers of utilities to absorb the war taxes of the utility industry. The Revenue Act under consideration there provided for but a 10% tax rate in contrast with the current corporate normal and surtax rates in the amount of 40% and 90% excess-profits taxes. We submit that the *Galveston* decision properly construed should not permit

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[48] Explanation of Principles for Determination of Costs under Government Contracts, War Dept.–Navy Dept. U. S. Govt. Printing Office, April 1942, p. 15.

[49] National Association of Cost Accountants Year Book. 1939, Proceedings of the Twentieth International Cost Conference; George E. Bennett, *Accounting Principles and Practices*, p. 185.

the inclusion of an operating cost of more than the usual ordinary income taxes.

Moreover, the Court there recognized that the position of the stockholders must be looked to, and hence concluded that the advantageous tax-exempt treatment of dividends received by the stockholders must be taken into account in appraising a fair rate of return. By the same token, the position of the stockholders in relation to the sharing of wartime tax burdens must be considered in the allocation of wartime taxes for rate-making purposes, and particularly in the assessment of a fair rate of return. This analysis has been well developed in a recent statement by Chairman Clyde O. Fisher of the Connecticut Commission who, though approving the allowance of all taxes as an operating expense, suggested that under present conditions the allowance of a rate of return of 4% would constitute the assumption of an appropriate share of the war burden by a utility. In his statement he asserted:

> It follows from this that it would be entirely appropriate to recast our thinking as to what constitutes a fair rate of return. The utility companies should have no cause for complaint if earnings were so reduced as to constitute a constant share of the total purchasing power used for nonwar purposes. Perhaps, under present conditions, a rate of 4% after all expenses including taxes is as high, comparatively and rela-

tively speaking, as would have been a rate of six or seven percent in the pre-war era. You will recall that Mr. Justice Brandeis in 1922 said that the exemption of dividends from the income tax constituted in reality a portion of the so-called fair rate of return. By the same token the assumption of one's appropriate share of the war burden might easily result in a reduction of what we have thought of traditionally as a fair rate of return. The solution of the problem that seems most promising was illustrated by a statement of the Bridgeport Hydraulic Company of Bridgeport, Connecticut, in notifying its stockholders in September 1942 of a reduction of 25% in the dividend rate: "to make a long story short, we are in the midst of the worst war in all history, and the company and its stockholders are a part of it" [50]

As the Commission restricted the hearing so as to preclude the reexamination of rate of return in the light of wartime economic conditions, and allowed the utility a rate increase when it was earning 5% upon an undepreciated rate base, with every prospect of improvement in income, it did not in merely disallowing income taxes above the rate of 31% thereby give such effect to wartime conditions as to justify its rate increase order.

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[50] Clyde O. Fisher, *The Incidence of War Taxes: Should They be Approved Operating Expenses*, War Convention of the National Association of Railroad & Utilities Commissioners, Sept. 15, 1943.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed with directions either to remand the case to the Commission for further proceedings or to vacate and set aside the order of the Commission.

Respectfully submitted.

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JANUARY 1944.

APPENDIX

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

> It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary coopera-

tion between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided,* That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7:

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulations, price schedule, or order issued or effective under this Act.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Preventing Inflation, and for Other Purposes," as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dis-

locations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * * *

Id., Title VI—General Provisions:

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the

rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state, or municipal law in order to keep down the cost of living and effectuate the purposes of the stabilization program.

District of Columbia Code (1940 ed.)

Section 43–301:

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1–10 of this title (Mar. 4, 1913, 37 Stat. 977, ch. 150, § 8, par. 2).

Section 43–306:

The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 7).

Section 43–315:

Every public utility shall carry a proper and adequate depreciation account. The

Commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. These rates shall be such as will provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the commission. The commission may make changes in such rates of depreciation from time to time as it may find to be necessary. The commission shall also prescribe rules, regulations, and forms of accounts regarding such depreciation which the public utility is required to carry into effect. The commission shall provide for such depreciation in fixing the rates, tolls, and charges to be paid by the public. All moneys in this fund may be expended in keeping the property of such public utility in repair and good and serviceable condition for the use to which it is devoted, or invested, and, if invested, the income from the investments shall also be carried in the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this section, unless with the consent and by order the commission (Mar. 4, 1913, 37 Stat. 979, ch. 150, § 8, par. 16).

Section 43–317:

Nothing in chapters 1–10 of this title shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable

and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of chapters 1–10 of this title. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement (Mar. 4, 1913, 37 Stat. 980, ch. 150, § 8, par. 18).

Section 43–402:

The commission shall have power to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it (Mar. 4, 1913, 37 Stat. 982, ch. 150, §8, par. 32).

Section 43–411:

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be

preferential or otherwise in violation of any of the provisions of chapters 1–10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it is to be found that reasonable service is not supplied, the commission shall have power to determine and substitute therefor such other regulations, time schedules, service, or acts, and to make such orders respecting and such changes in such regulation, time schedules, service, or acts as shall be just and reasonable. And upon any investigation for the purpose of determining upon and requiring any reasonable extension or extensions of lines or of service that shall promise to be compensatory within a reasonable time, the commission shall have power to fix, determine, and require every such extension or extensions to be made and the terms and conditions upon which the same shall be made: *Provided,* That no hearing shall be had and no order shall be made respecting such extension or extensions, without notice to the public utility affected thereby, as provided in section 43–410 (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 41).

Section 43–705:

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other

person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for the purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: * * * Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and

without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal, the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case * * * (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 2).

Section 43–706:

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, § 2).

569636—44——8

Section 43–911:

Whenever, after hearing and investigation as provided in chapters 1–10 of this title, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1–10 of this title (Mar. 4, 1913, 37 Stat. 992, ch. 150, § 8, par. 88).

Section 43–1002:

The Commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of chapters 1–10 of this title as well as all other laws relating to public utilities (Mar. 4, 1913, 37 Stat. 993, ch. 150, § 8, par. 90).

Section 43–201:

The Public Utilities Commission of the District of Columbia shall be composed of three commissioners as follows: (1) The Engineer Commissioner of the District of Columbia, and (2) two persons appointed by the President, by and with the advice and consent of the Senate * * * (Dec. 15, 1926, 44 Stat. 920, ch. 8, § 1).

U. S. GOVERNMENT PRINTING OFFICE, 1944

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 396

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL., PETITIONERS

v.

WASHINGTON GAS LIGHT COMPANY AND PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE PETITIONERS

This memorandum is in reply to certain assertions of fact made in the brief for respondent Public Utilities Commission.

1. The Commission's brief repeatedly points out that the Commission refused to consider any factors entering into the determination of rates save those calculated in accordance with the sliding scale arrangement. See *e. g.*, pp. 22, 24, 28, 36. This description of the hearings accords with that contained in the Commission's brief in

opposition to certiorari (pp. 7, 14) quoted in our principal brief at p. 32. It accurately reflects the position of the Commission. Nevertheless, the Commission's brief now contains an argument (pp. 57–66) apparently resting on the contention that in fact the Commission did consider evidence sought to be introduced by petitioners on the question of a proper depreciation allowance. We pointed out in our principal brief the critical nature of this issue (pp. 36–44). Not only does it involve an issue of essential fairness between the Company and the consumers, but acceptance of the correction for depreciation allowance would alone have eliminated the rate increase granted by the Commission. In evident recognition of the importance of this evidence, the Commission's brief argues that it was rejected on the merits and not because of its lack of conformity to the sliding scale formula.

The short answer is that this contention comes too late. The record is clear that the majority of the Commission refused to consider, on the ground of irrelevance, evidence of a proper depreciation allowance both when it was sought to be elicited through cross-examination of the Commission's chief accountant (R. II, 390–391) and through examination of petitioners' expert (R. I, 165–166). Indeed, when the dissenting commissioner wished to pursue the subject, he was reminded by the chairman that the question of a proper depreciation allowance was a "question

which has been ruled out, not once, but at least three times in this proceeding" (R. I, 166). While, as we pointed out in our principal brief (p. 40), counsel for the company suggested that Exhibit 8 be admitted for whatever weight it might have, without waiving the objection to it, and the Commission acquiesced in the suggestion, the Commission refused to reinstate the testimony which had been stricken in so far as it related to depreciation (R. I, 182–183), and the opinion of the Commission indicates that no consideration was given to an adjustment of the sliding scale with respect to the depreciation allowance. In fact, neither the testimony of the Administrator's witness on this subject nor the subject itself was mentioned in the Commission's opinion (R. I, 39–55).

For the first time counsel for the Commission have now attempted to meet the proffered evidence on the merits. Had this course been pursued at the hearing, there would have been suitable opportunity to explore the problem through further testimony of the witnesses. The brief in this Court is hardly an appropriate substitute.

Since, however, a number of statements of fact are made bearing on the issue of depreciation allowance which call for reply in the interest of clarity, we shall advert briefly to the principal points which are now sought to be made.

a. The Commission's brief states (pp. 59–60) that the petitioners' witness estimated the depre-

ciable property in the rate base at $26,000,000, and that this testimony was "conjectural." In fact, as the witness explained, the figure $26,000,000 was simply the result of accepting the Commission's rate base figure of $28,088,332 and deducting therefrom the items which on their face show that they are nondepreciable property, *i. e.*, materials and supplies, cash working capital, and land (R. I, 163; cf. Ex. 2, R. I, 233). The amount of this nondepreciable property was conservatively estimated by the witness and his judgment on this point was not disputed by any Commission or Company witness or by the Commission itself in its opinion.

b. The Commission contends (p. 61) that while the sinking fund method was approved by this Court in the *Natural Gas Pipeline* case, 315 U. S. 575, a different method was used by the Federal Power Commission in the *Hope Natural Gas Company* case, No. 34, present Term, and was recommended by the National Association of Railroad and Utilities Commissioners. The difference in the use of these methods demonstrates precisely the propriety of the sinking fund method in the present case. That difference, as we attempted to show in our principal brief (pp. 37, 42, note 12), turns on the fact that under the sliding-scale arrangement no deduction from the rate base for accrued depreciation is made. In the *Hope* case, on the other hand, where the straight-line method was used, the amount of the deduction for accrued depreciation was one of the principal points in con-

troversy, and the Commission there arrived at a figure of $22,328,016 for accrued depreciation and depletion. In describing the sliding-scale arrangement as a "modified straight-line method" (p. 59) the brief characterizes as a modification the absence of the most essential feature of that method, the deduction of accrued depreciation from the base.

c. The Commission now attacks also the use by petitioners' witness of an average life of forty-three years for the property, and it is said (p. 62) that petitioners "offered no evidence that 43 years even approaches a proper life expectancy of the property." Again, as the proffered testimony made clear, that figure was accepted from the company's own depreciation rate figure of 2.2 percent used for corporate purposes (Tr. 974), and is more favorable to the company than would have been the use of 1.75 percent provided in the sliding scale. (See our brief, p. 42, note 13.) Thus the witness did not "blindly assume," as the Commission's brief asserts (p. 64) a life of forty-three years; instead, he took the most conservative figure afforded by the company's own accounting practice.

d. The Commission asserts (p. 63): "Whether the accrual allowed by the Commission or the reserve for depreciation was excessive or inadequate, the Petitioners did not know and made no effort to ascertain." It was precisely in an effort to ascertain this fact that petitioners sought

to examine the Commission's chief accountant on the subject of the depreciation allowance and were met with vigorous objection sustained by the Commission, the Chairman stating: "The objection is sustained. If the questions are confined to the proper calculation made under the sliding-scale arrangement which has been in effect for years, then there is no reason to object to it" (R. II, 394). This was the ruling of the Commission despite the fact that immediately before the objections were made and sustained, the chief accountant had acknowledged that a "truer or more correct consideration of accrued depreciation" would be secured by applying a 6½ instead of a 4 percent interest rate to the reserve balance (R. II, 390).

This effort to ascertain the fairness of the provision for depreciation was not a novel or ill-considered notion. Not only was the same problem involved in the *Natural Gas Pipeline* case, but it had been pointed out in 1936 in a scholarly analysis of the sliding-scale arrangement. See Bussing, *Public Utility Regulation and the So-Called Sliding Scale*, pp. 133, 136: "Under this arrangement, however, the company is permitted to earn 7% (7½% prior to January 1, 1933) on the reserve, but it pays only 4% into the depreciation account, thus retaining 3% as a virtual unearned increment. * * * An undepreciated rate base is fallacious and unjust

because it permits the company to earn a return on property provided by the consuming public. The Washington plan does not commit the full breach, however, for it requires the company to pay 4% for the use of property on which it is allowed to earn 7%." Those observations were addressed to the sliding-scale plan applicable to the Electric Company, but they are equally applicable here, except that the primary rate of return is 6½% rather than 7%, the respondent company having earned, however, an average of 6.86 percent under the arrangement through June 1941 (Ex. 11, R. II, 421). There is no evidence whatever that the reserve balance to which the rate is applied is held as a separate fund or invested in securities; as in the *Natural Gas Pipeline* case, it is part of the revenue-earning property.

2. The Commission objects to our showing that on the Company's own figures it was earning a return of 5% after all income and excess profits taxes, for the reason that we corrected the return from 4.87% to 5% by reason of an annual saving in taxes occasioned by a preferred dividend clearly not taken into account in the company's original calculations (see our brief, p. 79). The objection is a minor one, to the effect that the correction should not have been made on an annual basis but only for the second half of the test year, during which the tax credit came into op-

eration. In applying the correction to the Company's figures on an annual basis, we follow what appears to have been the treatment of federal income taxes in both the Company's and the Commission staff's calculations, whereby the higher rate in effect during 1942 was applied to the entire test year, including the second half of 1941, pursuant to the sliding-scale plan (R. I, 48).

3. The Commission impugns the conclusion of petitioners' witness that a rate reduction of $47,668 under the sliding scale was indicated by his calculation, because the dissenting commissioner concluded that a rate reduction of approximately $1,000,000 was justified (Br., pp. 69–70). The difference, of course, is accounted for by the fact that the calculation of the witness dealt with very limited corrections in the sliding scale, being confined to the use of the sinking fund method of depreciation and the disallowance of income taxes above 19%. The commissioner's calculation, on the other hand, embraced all elements entering into the rates, including the rate of return and very substantial items of claimed operating expenses, the classification of which was disputed.

4. The Commission (Br. p. 70) refers to our statement that bonds of the company were sold after the order of rate increase had been set aside by the district court, as a contention that "the setting aside of the order made the bonds market-

able." Of course our contention was that the order of increase had little if any effect on the present credit position of the company. In discussing the credit position of the company, the Commission makes a significant admission (Br. p. 72): "It was not the size of the increase nor the immediate effect on income that was important to the successful selling of securities. This was the first time under the sliding scale arrangement that an increase was indicated; hence the important question was whether the Commission would adhere to the arrangement. The integrity of the Commission was at stake." If any departure from the sliding scale arrangement threatened the credit of the company as a matter of principle, it is difficult to understand why the Commission was willing to disallow income taxes above 31%. It is difficult to understand, also, why the Commission in the hearing for the subsequent year was willing to modify the primary rate of return under the arrangement from 6½ percent to 5¾ percent (though allowing all federal income taxes except excess profits taxes). See Order No. 2682, November 8, 1943, pp. 17–18.

5. The Commission's brief (p. 70) challenges our statement that the Commission went outside the record to show in its opinion the earnings of the company's stock, and it is said that the finding was based on two finance dockets received

in evidence. But the opinion described earnings for twelve months through July 31, 1942 (R. I, 51) while the finance dockets were closed prior to April 30, 1942 (Tr. 2106–2223; 2235–2391; 2393–2543). The Commission did not pursue its investigation of earnings into the period up to November 16, 1942, when petitioner's motion for reconsideration was denied. We have pointed out in our brief (p. 50) on the basis of the record that for the first seven months of 1942 the income of the Company was on an upward trend as compared with the corresponding period of the previous year. This has not been challenged by the Commission or the Company. Had the Commission projected its inquiry into the earnings record before finally disposing of the case this trend would have been confirmed. In fact, the net operating revenues for 1942, after all expenses, including wages and all federal income taxes, proved to be in excess of those for 1941.

6. The Commission points out (Br. pp. 65–66) that one figure used by the dissenting commissioner in the 1943 case was later corrected; that figure, however, was not used in our brief, and its correction after the opinion was published is not material.

7. The Commission maintains (Br. pp. 62–63) that the depreciation method employed was twice approved by the District Court for the District of Columbia. While the sliding-scale arrange-

ment was approved as a whole, the unfairness of the depreciation method was not presented until the instant case and *United States by its Director of Procurement, Treasury Department, et al.* v. *Flanagan*, Nos. 20310, 20311, 20450, now pending in the district court. The most significant feature of the prior decisions is the emphasis on the Commission's continuing authority and responsibility to establish just and reasonable rates and to reexamine the sliding-scale arrangement if necessary to that end. In *Potomac Electric Power Co.* v. *Public Utilities Comm'n* (1931), Eq. No. 53475, Wheat, C. J., said:

> I do not wish to be understood, however, as upholding the contention that the order challenged is invalid because it is in disregard of the so-called Consent Decree of December 31, 1924. Neither that decree, nor the agreement upon which it was based, had, or could have had, under the statute, the effect of settling permanently the question of the proper rates to be charged by the plaintiff. That question presents a continuing problem, to be solved from time to time as it arises. So is the power of the Commission to solve it a continuing power, to be exercised from time to time according to the need. Correspondingly, the duty of the Commission is a continuing duty. Neither a court decree nor an agreement can deprive the Commission of

that power or absolve it from that duty. All this seems plain from a reading of the the statute.

Respectfully submitted.

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No. 396

IN THE

Supreme Court of the United States

October Term, 1943

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

BRIEF IN OPPOSITION OF RESPONDENT WASHINGTON GAS LIGHT COMPANY TO PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION OF RESPONDENT WASHINGTON GAS LIGHT COMPANY.

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. II, 428-443)[1] and the dissenting opinion of Justice Miller (R. II, 443-449) are not yet officially reported, but are reported at 50 P. U. R. (N. S.) 33 *et seq.* The opinion of the District Court (R. I, 15-20) is reported at 48 F. Supp. 703. The findings and opinion of the Public Utilities Commission of the District of Columbia (R. I, 39-57) and the dissenting opinion of Commissioner Hankin (R. II, 271-317) are reported at 46 P. U. R. (N. S.) 1 *et seq.*

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on July 26, 1943 (R. II, 451). The jurisdiction of the Court rests on Section 240(a) of the Judicial Code (as amended by the Act of February 13, 1925) and on 28 U. S. C. § 350. See also D. C. Code (1940) § 43-705.

STATUTES AND ORDERS INVOLVED.

The pertinent parts of the statutes involved, as well as the pertinent parts of the orders involved, are set forth in the Appendix, *infra*, pp. 22-25.

STATEMENT OF THE CASE.

Certain facts antecedent to the present proceeding are material. In December, 1935, the Commission[2] concluded

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[1] Record references are as follows: "R. I", Appendix to Brief of Respondent Washington Gas Light Company in Court of Appeals; "R. II", Appendix to Brief of Petitioners Administrator and Director in Court of Appeals; "Tr. I", original Transcript of Record in Nos. 8501 and 8503 in Court of Appeals, on file in this Court; "T. II", Original Transcript of Record in Nos. 8502 and 8504 in Court of Appeals, on file in this Court.

[2] The parties involved in this proceeding are referred to herein as follows: Petitioner Price Administrator, "Administrator"; Petitioner Director of Economic Stabilization, "Director"; Respondent Public Utilities Commission of the District of Columbia, "Commission"; Respondent Washington Gas Light Company, "Company".

a valuation of the Company's property and a rate case which had consumed three and one-half years of time, cost $750,000, yielded 12,000 pages of testimony and 260 exhibits, and had resulted in 111 printed pages of findings. The Commission found a rate base and a rate of return, prescribed certain accounting procedure, and incorporated in its order a "sliding scale arrangement" as authorized by its statute.[3] This "sliding scale" consists of an annual audit of the accounts of the Company, an annual hearing in respect to its rates, an annual adjustment of the rate base by net additions at actual cost, and an annual rate order in which the rates for the ensuing "rate year" (September 1-August 31) are computed upon the basis of the past year's experience adjusted to approach the stated fair return.[4] The noteworthy features of the arrangement are

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[3] D. C. Code (1940) § 43-317, p. 24, *infra*.

[4] Basically, the plan underlying the sliding scale arrangement (see Order 1458; Tr. I, 262-280) was the establishment of an initial rate base ($21,000,000, exclusive of working capital) for the Company as of June 30, 1935, and a primary rate of return (6½ per cent), together with a schedule of rates, effective from December 13, 1935, to August 31, 1936, and provisions for subsequent annual adjustments of the rate base and the schedule of rates designed to keep the net operating earnings of the Company at an approximation of the primary rate of return on the adjusted rate base.

Under the terms of this order, the Commission, after giving due notice thereof, holds annual hearings on the application of the sliding scale arrangement to the results of the operation of the Company for the preceding year. As a matter of practice, the annual hearing, which is held in August of each year, is preceded by an audit of Company's affairs by the Commission's staff. At the hearing, the Commission receives evidence from its staff experts, witnesses for the Company, and witnesses for any person or association who may have become parties to the hearing under the Commission's rule permitting intervention.

On the basis of the facts found from the evidence submitted at the annual hearing, the Commission determines, pursuant to the "sliding scale" procedure established in the Order 1458, *supra*, the schedule of rates to be effective for the ensuing *Rate Year* (September 1 to August 31). First, the Commission finds the rate base as of the *Adjustment Date* (the June 30th preceding the beginning of the *Rate Year*), by adding to the initial rate base the additions,

that the rate base works gradually toward complete actual original cost, rates to consumers increase or decrease only as costs of operation increase or decrease, the rates are predicated upon actual experienced expenses and revenues and not upon estimates, the return to the Company is kept currently at approximately the stated level, and the method is simple, expeditious and inexpensive. Every year since 1935, until 1942, the rates have either been decreased or remained unchanged. This proceeding involves the first increase.

ORIGIN OF PRESENT PROCEEDING. The present proceeding was the regular annual audit and hearing to determine the rates of the Company for the rate year beginning September 1, 1942. At the time the case began (August, 1942; R. I, 68), the Administrator had no responsibility for, or right of participation in, the regulation of public utility rates. The Emergency Price Control Act, from which he derived his authority, expressly provided, "Nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common car-

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at cost, to the Company's properties from June 30, 1935, to the Adjustment Date, and subtracting therefrom, also at cost, retirements from the Company's properties for the same period. Next, the Commission determines the *Net Amount Available for Return for the Test Year* (the year ending on the *Adjustment Date*). This is done by subtracting designated expenses for the *Test Year* from Respondent's Gross Operating Revenue, as computed according to the provisions of the order. The rate base as of the *Adjustment Date* is then divided into the *Net Amount Available for Return for the Test Year*. The resulting percentage is the rate of return earned for the test year. If the rate of return is in excess of, or lower than, the primary rate of return of 6½%, gas rates are adjusted, effective for the ensuing *Rate Year*, to effect a decrease or increase, as the case may be, in net operating earnings. The change in gas rates is measured by specified percentage of the rate base, depending upon the amount of such excess or deficiency. Revised rate schedules are then established by order of the Commission, for the ensuing *Rate Year*.

rier or other public utility."[5] Nevertheless, his Counsel was present by invitation at the pre-hearing conference in this proceeding (R. I, 84), and when the formal hearing began, the first order of business was the granting of his petition to intervene (R. I, 69, 72, 73). The reason for this action was soon made clear by the Commission. The Chairman stated, "We must consider existing conditions and the bearing of those conditions upon the question before us, * * *. That is where the O. P. A. comes in, in my estimation, to give us the benefit of their views regarding the granting or refusing to grant a rate increase in view of general economic conditions, to prevent inflation. We are just as interested in that as O. P. A. is. You have made a study, presumably, and you have something which will be of value to the Commission in making up its mind on the second point." (R. I, 132.)

Participation by O.P.A. Counsel for the Administrator was thereafter active throughout the proceeding. He participated in the discussion of almost every point which arose. He at first reserved his cross-examination (R. I, 95, 96, 100, 101, 102) and at his convenience later cross-examined almost every witness (R. I, 100, 111-121, 130, 142, 143, 144; Tr. I, 739, 779-904, 975-976, 1094-1098, 1159-1171, 1186-1188, 1197-1211, 1331, 1359-1368). He made many arguments. He requested postponements from time to time (Tr. I, 752, 754, 900, 1143, 1561), all of which were granted, although not always for the time requested (R. I, 110, 121, 130-131, 220; Tr. I, 774, 915, 988-989, 1144, 1575). He presented three witnesses: the Assistant Director of Research of the Office of Price Administration (R. I, 151), who testified as to the policies and program of the Administrator; the Chief Examiner of Accounts, Division of Finance and

[5] Clause (2) of Section 302(c) of the Emergency Price Control Act of 1942, 56 Stat. 29, 36, 50 U. S. C. App. (Supp. II) § 942(c). Administrator Henderson himself had told Congress that public utility rates should be left to the several Federal and State regulatory commissions, long established and expert in this complicated field (Hearings on H. R. 5479, 77th Cong., 1st Sess., Pt. I, pp. 54-55, 144, 444, 626).

Statistics, Bureau of Accounts, Finance and Rates of the Federal Power Commission, on loan to the Office of Price Administration for the purpose of this proceeding (R. I, 158); and an Assistant Business Analyst from the Office of Price Administration (R. I, 169). He recalled, as his own, witnesses who had testified for the Commission and the Company (R. I, 220; Tr. I, 1143). He filed a brief and a supplemental brief. At the end of it all, he stated (R. I, 226):

> "I want to say this: We think the record is clear now that the Commission's order is inflationary in character."

Thus he indicated his own satisfaction with the nature and extent of the evidence which he had presented on that point.

During the course of the hearing, an exhaustive inquiry was made into the operating expenses of the Company. Hundreds of pages of testimony were taken concerning such matters as costs of advertising, demonstration expenses, promotional expenses, officers' salaries, employees' welfare costs, services on customers' premises and other items (Tr. I, 619-1210). Record was made of rising wage costs and fuel costs, two of principal items of expense. Inquiry was also made into the matter of taxes—normal taxes, excess profits taxes, capital stock taxes, war taxes (Tr. I, 830-973, 1119). The record of prior proceedings concerning the finances of the Company, its financial structure, methods, costs, and needs were made part of the record. (Ex. 3; RI, 95.)

The hearing was finished and closed on September 14 (R. I, 181), and briefs were filed. Thereafter, the case was reopened and again closed on September 30.

Act of October 2, 1942. On October 2 Congress passed and the President approved an Act,[6] which in the proviso to Section 1 thereof reads:

> "* * * no common carrier or other public utility shall make any general increase in its rates or charges which

[6] 56 Stat. 765, 50 U. S. C. (App.), Supp. II, §§ 961-971.

were in effect September 15th, 1942, unless it first gives thirty days' notice to the President or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

It is noteworthy that the Act in terms imposed no duty upon the Commission, and that the duties imposed upon the Utility were to give notice and to consent to intervention by the President's representative.

Petitioners do not refer to the legislative history of the proviso. We have printed the pertinent part of the debate thereon in the Appendix.[7] When the bill which became the Act of October 2, 1942, was before the Senate, Senator Norris of Nebraska expressed the view that the President should have the right to veto public utility rate increases, and he presented an amendment to that effect. It passed the Senate and went to Conference. The Conferees refused to accept the amendment, and the language now in the statute, quoted hereinabove, was substituted. When the Conference report was submitted to the Senate, Senator Norris explained in careful phraseology that the substituted language (now in the statute) "does not, technically, afford any relief whatever." He explained that under that proposed language, "When the President's representative appears before the tribunal having jurisdiction to fix or increase utility rates, he could say—and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation." But, Senator Norris pointed out, the proposed language would permit the President's representative to appear as an intervener in these cases, and would, moreover, have "a great moral effect" upon the regulatory commissions. The Senator said, "I myself feel disposed to accept this language." That explanation was concurred in by the Senator in charge of the bill, and with that explana-

[7] See pp. 26-31, *infra*.

tion, to which there was no dissent, the Senate adopted the Conference report.

SEQUENCE OF EVENTS AFTER OCTOBER 2, 1942. October 3 the President created the office of Director of Economic Stabilization, and designated the Director, his representative, to receive the notices provided for by the proviso to Section 1 of the Act of October 2.[8] October 7 the Director took office. October 13 the Commission handed down its order in this case (R. I, 55). There was at that time considerable doubt as to whether the Act of October 2, above quoted, applied to a case closed before its enactment. The Interstate Commerce Commission held that it did not, and the point was not decided until the Court of Appeals for the District of Columbia passed upon it,[9] reversing the I. C. C., and this Court on April 5, 1943, denied certiorari.[10] But the Commission in the present case took the view that the Act did apply, and in its order called to the attention of the Company the requirements of the Act and quoted the applicable provisions thereof (R. I, 56).

Thereupon, on October 15, the Company served upon the Director the required notice (R. I, 188). October 19 the Director, by the same Counsel who had theretofore represented the Administrator, petitioned to intervene (R. I. 57). October 23 the Commission granted the petition, reopened the case and set further hearing for November 2 (R. I, 184). October 30 the Company formally consented to the intervention (R. I, 191). November 4 the hearing, postponed from November 2 at the request of the Director (R. I, 215), was held (R. I, 220-229). November 9 the Commission denied the Director's motion to vacate the order (R. I, 66-67). November 16, thirty days after the statutory notice, the Company put the new rates into effect (Tr. II, 174), and with prospective operation only. The Order of Octo-

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[8] Executive Order 9250, 7 Fed. Reg. 7871 (see p. 25, *infra*).

[9] *W. M. and A. Motor Lines* adv. *Henderson, Adm.*, 132 F. (2d) 729.

[10] 318 U. S. 779.

ber 13, 1942, will expire when the Commission almost any day now, issues its order establishing the schedule of rates for the current *Rate Year* (September 1, 1943, to August 31, 1944), pursuant to hearing held from August 31 to September 11, 1943.[11]

EXTENT OF CONSIDERATION BY THE COMMISSION. The Commission in its Findings and Opinion (R. I, 39, 40) stated its responsibilities as two, first to ascertain whether a rate increase was indicated by the ordinary processes of ratemaking, and second "to give recognition to existing conditions and the bearing of such conditions upon the question before us. In addition to the present economic situation, which admittedly is of vital importance, we must also consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia."

The staff of the Commission had testified "that computations in accordance with the sliding scale arrangement indicated that the Company was entitled to a rate increase of $324,718.06." The Company claimed an increase of $381,597. (RI, 40-41.)

The Commission considered in detail certain disputed expenses (RI, 41-44, 45-48). It considered and disallowed excess profits taxes as a deduction for rate purposes "in order to prevent the direct inflationary effect which [the allowance of such taxes] would invite." (RI, 49), although it at the same time recognized the equity of the Company's contention that, if the Commission had been in a position (a quorum was lacking) to approve its issuance of proposed preferred stock, there would have been no excess

[11] In its 1942 order the Commission included a provision to the effect that if any portion of the rate increase should result in the payment of excess profits taxes by the Company, such part of the rate increase should be refunded to the gas customers (R. I, 49). Because of the operation of this provision, early in 1943, the Company refunded to its customers all of the rate increase which was billed between the date on which the rates were put into effect, November 16, 1942, and December 31, 1942.

profits tax (RI, 44-45). As to Federal income taxes, the Commission decided to allow a deduction of only 31 per cent instead of the 40 per cent tax levied by the Revenue Act of 1942 (RI, 48-50). This decision was reached by the Commission after it had given consideration to the question whether in light of "present-day conditions . . . accruals for Federal income taxes, at rates considerably higher than rates in effect in previous years, should be allowed in their entirety for rate-making purposes." (R. I, 48).

Then the Commission came to the consideration of "the financial position of the Company and particularly its ability to secure capital economically for the purpose of expanding its plant to meet the growing demands for gas service." The Commission said, "The District of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service." (R. I. 50-51).

The Commission then pointed to the fact that although the Company had offered for sale 40,000 shares of $5.00 cumulative preferred stock in an effort to finance its war construction necessities, it had been successful in selling only 18,206 shares. The Company's income deductions and preferred dividends had been earned 1.88 times in 1941 but only 1.75 times in the twelve months ended April 30, 1942, and 1.67 times for the twelve months ended July 31, 1942. For 1941 the earnings per share of common were $2.24, for the twelve months ended April 30, 1942, were $1.96, and for the twelve months ended July 31, 1942, were $1.80. Labor costs had increased by more than $300,000 (*Idem.*)

Then the Commission "after careful consideration of all factors having a bearing on this case" concluded by granting an increase of $201,424.74. The rate of return thus allowed was 5.57 per cent. The Commission said, "This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend to arrest the decline and preserve the principles

inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure." (R. I, 51-52.)

The Commission analyzed the effect of the increase upon individual customers, pointing out that the average was 3 cents per month.

APPELLATE PROCEEDINGS. The District Court, upon appeal by Petitioners, reversed (R. I, 20-21) the Commission, but it later developed that at the time of entering his judgment, the Justice of that Court had not seen, or even been aware of, the record of the proceeding before the Commission. He later wrote (R. I, 29), "It is with some chagrin that I admit the certified record of the proceedings of the Public Utilities Commission was not physically brought to my attention upon the appeal."

The Court of Appeals, at the conclusion of an exhaustive examination into every aspect of the case, reversed the District Court. The opinion is in the record in full, (R. II, 428-443) and is not repeated or summarized here. In essence, the Court held that the power to regulate public utility rates had been left by Congress to the various established regulatory commissions, that in this proceeding the Commission had not only permitted but sought the assistance of the Petitioners, that both the terms and intent of the Act of October 2 had been fully met, that the Commission had given very practical heed and effect to present-day economic conditions and the national program against inflation, and that its findings were supported by conclusive evidence.

QUESTIONS PRESENTED BY PETITIONERS.

Petitioners ask certiorari for the consideration of five questions (Pet. 3-4), and in the statement of those questions show that they wish the Court to review as if upon appeal the entire proceedings below, both in the Courts and before the Commission. In Question 1 Petitioners allege that they were not afforded a full and fair hearing. Questions 2, 3 and 4 are interrelated and are summarized by Petitioners (Pet.

10) as raising the question whether under present conditions the regulatory authorities are under a legal duty, imposed by their own statutes and by the Act of October 2, 1942, to deny every utility rate increase as inflationary, and therefore as unjust and unreasonable, in the absence of a clear showing that the increase is necessary. Question 5 concerns two items of expense.

Respondent says, and the opinion of the Court of Appeals shows, that none of the questions posed by Petitioners as substantive principles of law or propositions of general importance arise upon the record in this particular case; the Petition shows that Petitioners merely disagree with the expert regulatory judgment of the Commission as to what matters presently required inquiry and as to the factual necessity for an increase in rates.

Petitioners nowhere point to error in the opinion of the Court of Appeals.

Question 1—The Fullness and Fairness of the Hearing.

Petitioners specify the particulars in which they allege that the hearing fell short of being full and fair, listing them (a) to (e), inclusive (Pet. 11-12).

(a) Petitioners complain that the Commission restricted the scope of the hearing. For what scope did Petitioners contend? At one point they asked that the proceeding be "without restriction as to the type of evidence to be presented or otherwise limiting the scope of further hearing." (R. I, 63.) This was a plea for the complete abdication of the Commission and for complete chaos of proceeding. That request was denied, and the propriety of the denial is plain without elaboration.

Later Petitioners contended (R. I, 207) that the Commission must redetermine in this proceeding the proper rate base, fair operating expenses, including depreciation, other proper operating expenses, allowable Federal taxes, and the fair rate of return. The Commission made an exhaustive inquiry into operating expenses and taxes. It declined to

insert as issues in this proceeding the rate base, the method of computing depreciation, and the rate of return. The propriety of the refusal is made apparent, we submit, by the discussion of these items in (b), (c), and (d) below.

The Commission did not, as Petitioners state, rule "that the scope of the hearing was restricted by the antecedent sliding scale arrangement" (Pet. 11). The Commission repeatedly stated (R. I, 123, 132-133; cf. R. I. 40) that the problem before it was in two parts: (1) the rates indicated by the sliding scale arrangement, i.e., the normal rate-making process for this Company; and (2) if an increase were thus indicated, whether such increase was in conflict with the national stabilization program.

(b) Petitioners complain (Pet. 11) that the Commission refused to reconsider the established rate of return, which was 6½ per cent. Let it be well understood that the reference by the Commission to 6½ per cent (R. I, 52) as the fair rate of return was purely theoretical. The Company had earned 4.87 per cent for the past year, and the Commission allowed 5.57 per cent for the ensuing year. The Commission did not allow 6½ per cent. It merely said that such would be a fair rate of return.

The actual cost of money to this Company, as the Commission well knew, was slightly more than 6½ per cent. The Federal Power Commission in all of its recent gas company cases had held 6½ per cent to be the fair rate of return.[12] Moreover, the applicable rule is thus stated:

> "The rate of return to be allowed in any given case calls for a highly expert judgment. That judgment has been entrusted to the Commission. There it should rest."[13]

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[12] *Natural Gas Pipeline Co.* case (35 PUR (NS) 41, 54; 315 U. S. 575, 596); *Hope Natural Gas Company* case (44 PUR (NS) 1, 33; 47 PUR (NS) 129, 135); *Panhandle Eastern Pipe Line Company* case (45 PUR (NS) 203, 215); *Canadian River Gas Company* case (43 PUR (NS) 205, 229).

[13] *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 607.

No fact and no law was proffered by Petitioners to indicate any impropriety in the rate of return. They relied solely upon an unfortified plea for reexamination.

(c) Petitioners complain (Pet. 12) that the Commission's action in respect to depreciation "appears to disregard the reasoning in this Court's opinion" in *Federal Power Comm.* v. *Natural Gas Pipeline Co., supra.* The "reasoning" which the Commission's action "appears to disregard" is not specified, and we are unable to recognize it. The *decision* of the Court in that case was that the choice of a method of computing depreciation is for the Commission. The holding of the Court of Appeals in this case was in accordance with that decision.

(d) Petitioners complain (Pet. 12) that "The Commission rejected Petitioners' request, directed to show that no hardship was being imposed on the Company, that the Commission consider data (already in the Commission's records) which indicated that the rate base was in excess of the original investment." Originally, at the hearing before the Commission, Petitioners contended that the Commission was required, if so requested, to redetermine, "What is the proper rate base?" (R. I, 207.) That contention is now apparently abandoned.

Petitioners are now notably vague in describing what they would have the Commission do. They assert that they neither suggest nor contemplate a "protracted rate hearing" or a "full-scale valuation hearing" (Pet. 12). They point to no probable public benefit from a reexamination of the rate base. They say that the Commission must "consider", but they do not suggest the manner or the process by which that consideration would be had, or what tangible evidence of "consideration" must be made to satisfy their contention. Nowhere is it shown that the Commission did not consider the "data already in the Commission's records". The Commission heard the arguments of Petitioners' Counsel (R. I, 83-84, 206-207) and the long statement of its own Commissioner Hankin (R. I, 74-80; cf. R. I. 97-99) advo-

cating the reexamination of the rate base and, after a meeting in executive session upon the subject, declined to inject that issue into this proceeding (R. I, 97). Presumably, its consideration and action were upon the data already in its records plus the allegations of fact and contentions of law presented in this proceeding.

Petitioners do not describe in any fashion the "data already in the Commission's records" which they insist the Commission should consider. They merely say that the data "indicated that the rate base was in excess of the original investment". They do not indicate in their Petition what the excess was. Throughout the proceedings the only claim of that nature was that the item of land was included in the rate base at its fair value in 1935 instead of at its original cost. With that sole exception, no claim was made that any item in the rate base of $28,000,000 was in excess of the original investment. Even so, Petitioners do not advance to this Court the proposition that the Commission is compelled by law to fix the rate base at the original investment. Indeed they could not, for a local statute governs that matter in this proceeding.

As the Court of Appeals pointed out (R. II, 441), the statute in the District of Columbia, which is an Act of the Congress of the United States, requires that the Commission value the property of public utilities "at the fair value thereof at the time of said valuation"[14] That statute further specifies that the Commission must consider not only cost but also the amount of money it would require to secure the right of way, etc., "and to replace all the physical properties belonging to the public utility".[15] So this Commission could not, even if it wished to do so, fix the rate base at the amount of the original investment, unless that amount happened to coincide with the fair value of the property at the time of the valuation.

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[14] D. C. Code (1940) § 43-306 (see p. 24, *infra*.)

[15] D. C. Code (1940) § 43-305 (see p. 23, *infra*).

(e) The fifth and last specification of complaint upon this point (Pet. 12-13) appears to contain three elements. The first is a reference to the date, September 1, 1942. In its order the Commission mentioned this customary date for the beginning of a new Rate Year (R. I, 56), but immediately, in the next sentence, said, "However, the Commission directs the attention of the Company to the provision contained in the Act approved October 2, 1942, * * * which reads as follows:" and quoted the new statute. The fact is that the new rates did not go into effect until November 16, thirty days after the statutory notice had been given.

Petitioners next say that the Commission's first order was issued before the 30 days' notice required by the Act of October 2 was given "petitioner". The facts are that the Administrator had been a party to the proceeding since the first day of the hearing, and that when the Director came into existence the case was reopened, the Director intervened, further hearings were held for his benefit, and the increased rates did not go into effect until after the expiration of 30 days from the giving of the notice.[16]

Petitioners next refer to the order of the Commission granting the Director's petition to intervene for the purpose of showing "the inflationary effect, if any" of the proposed increase (R. I, 62-63). In his petition the Director said that he had a "right to appear in this proceeding for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common

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[16] As indicated by the Court below, this contention of the Petitioners raises but a technicality which does not obscure the fact that the requirement of notice was complied with in this case. The Court said (R. II, 431): "In short, the contention does not go to the substance of the matter and the provisions of the amendatory Act requiring prior notice and consent to intervention by the Presidential agency were complied with."

carriers or other public utilities." (R. I, 59.) The Commission accorded him the full right which he asserted. The fact is that the order was almost the same in language and precisely the same in meaning as the Director's petition. Moreover, the order was in precise accord with the intent of the Act made clear beyond possibility of dispute by its legislative history, to which reference has already been made.

Questions 2, 3 and 4—The Duty of the Commission to Find a Rate Increase Necessary.

Petitioners summarize these questions (Pet. 16) as being whether the Commission was under a legal duty, imposed by its own statute and by the Act of October 2, 1942, to deny any rate increase as inflationary, and therefore as unjust and unreasonable, in the absence of a clear showing that the increase was necessary.

The complete answer to this contention in this case is that the Commission found that the increase was necessary and stated the reasons upon which it made that finding. At a later point in their petition, Petitioners seem to acknowledge that fact and there contend (Pet. 16) that the considerations advanced by the Commission as indicating the necessity for the increase are inadequate.

In its Findings and Opinion, which we have detailed hereinabove,[17] the Commission found that there was a vital necessity for adequate gas service in Washington as the Nation's No. 1 Defense Area, that the Company had failed in its effort to finance its war construction program, that the Company faced declining net earnings and increasing expenses and that an increase in rates which would "tend to arrest the decline" was necessary to protect the credit of the Company and to enable it to finance its war needs. This phase of the Commission's order was considered at length in the opinion of the Court of Appeals, and the Court concluded:

[17] See pp. 9-11, *supra*.

> "Manifestly the order of the Commission was issued only after a deliberate and careful study of the factors affecting the business of the utility in wartime Washington without a trace of hasty or arbitrary conduct on the Commission's part. * * * The conservatism of this action is demonstrated by the finding of the Commission, based on convincing evidence, that the Company could not finance its needs and install the extensions required to fill the demands of the 'No. 1 Defense Area of the United States', unless the decline in earnings was arrested and the principles of the sliding scale arrangement, on which the credit position of the Company depended, were preserved." (R. I, 438.)

And again the Court said:

> "It must be borne in mind that there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates. On the contrary the Commission expressed a desire to hear the Price Administrator and urged him to present any evidence in his possession on this point. Moreover, the Commission gave heed to present day conditions by reducing the allowance which the sliding scale would have justified and at the same time ordered a small increase in rates in order to buttress the financial condition of the Company and enable it to satisfy the abnormal demands upon it." (R. I, 443.)

Petitioners separate their contention on this point, but when sections 1 (Pet. 9-10) and 4 (Pet. 16-20) of "Reasons for Granting the Writ" are read together, it is clear that Petitioners' contention is not that no showing of necessity was made, but that the findings of the Commission as to necessity were inadequate. Those findings were supported by substantial evidence; they were not arbitrary. Unless the determination of public utility rates has been confided to some authority other than the Commission, or unless some authority superior to the Commission has imposed a standard for determining the necessity of a rate increase, these findings of this Commission cannot be disturbed by the Court.

Petitioners frankly confess their inability to describe "the criteria of necessity" (Pet. 14, n. 6). They say that the provision in Section 1 of the October Act, namely "necessary to aid in the effective prosecution of the war or to correct gross inequities" (which by its terms applies to prices and wages but not to utility rates) is "satisfactory" and "give(s) apt direction to administrative judgment". But even Petitioners do not advance this definition as a compulsory limitation upon administrative judgment.

Congress not only intended abstractly that regulation of utility rates should be left in the hands of the expert regulatory commissions, state and federal, but it evidently affirmatively meant exactly that. It inserted in the Price Control Act a specific exclusion of those rates from control under that Act.[18] And in the October Act, it *twice* repeated the limitation included in the earlier Act, so as to make the matter not only clear but also certain. It said, in Section 2 of the October Act,

> "* * * The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."[19]

(The utility exclusion was *Clause (2)* of Section 302(c).) And again it said in that same Act,

> "Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2) * * *."[20]

Petitioners contended in the Court of Appeals (cf. R. II, 433 with R. II, 447) that the first two sentences of Section

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[18] Clause (2) of Section 302(c), see p. 22, *infra*.

[19] Section 2 of the Act of October 2, 1942, see p. 23, *infra*.

[20] Section 7(c) of the Act of October 2, 1942, see p. 23, *infra*.

1 of the October Act, giving the President certain powers over "prices, wages and salaries", in some way applied to utility rates. But the Price Control Act defined "prices" and in the definition specifically excluded utility rates. (Sec. 302(c).) So Petitioners have apparently abandoned that contention.

Petitioners say (Pet. 15) that "preoccupation with an antecedent formula cannot form the measure of the Commission's duties", referring to the sliding scale arrangement. This is an insinuation without foundation. As the Court of Appeals pointed out, the Commission did not approve the increase required by the sliding scale arrangement (R II, 438). Its own staff testified that under the sliding scale arrangement the Company was entitled to an increase of $325,000, but the Commission allowed only a $201,000 increase. It allowed only the increase necessitated by its findings as to the credit position of the Company and the need for the financing of its wartime construction programs.

Question 5—Items of Expense.

This question (Pet. 3-4) relates to two items of expense, income taxes and depreciation.[21]

In respect to taxes, Petitioners say (Pet. 17) that "the Commission was under a duty to disallow all income taxes above those levied at peacetime rates". They do not suggest the source of the "duty", and cannot do so because neither statute nor court decision has imposed such a duty. But, even so, the Commission in this case did disallow all income taxes above peacetime rates. Although the corporate tax rate for 1942, our first war year, was 40 per cent,

[21] Petitioner's contention under this question with respect to depreciation seems to be set forth at page 12 of the Petition (cf. Pet. 20 with Pet. 12). We have discussed this contention elsewhere (see p. 13, *supra*).

the Commission allowed a deduction of only 31 per cent, the tax rate for 1941. What do the Petitioners mean by "peacetime" rates? Do they mean prior to 1939, or do they mean the probable tax rates in the peacetime after the war? They do not particularize their question, because any particularization would imperil the principle upon which they and the Commission agree. Petitioners do not quarrel with the principle adopted by the Commission at their insistence. They merely dispute the finding as to the resultant amount.

CONCLUSION.

No question of general importance or of substance is presented by the Petition on the record in this case. The particulars in which the hearing is alleged to have been not full and fair involve no more than the expert regulatory judgment of the Commission upon a request that the issues in the case be expanded, no probable public benefit being indicated by the proponents, and no proof being proffered to support the request. As the Court of Appeals said: "What he (the Administrator) desired was an indefinite postponement of any increase in rates pending an exploratory investigation by the Commission in which he was willing to assist as best he could." (R. II, 441.)

The judgment of the Commission gave recognition to war expansion necessities and to credit needs. The Commission and the Court of Appeals thought these considerations adequate support for the token increase which was granted. The findings were supported by convincing evidence.

Although Petitioners pose general questions in the earlier sections of the Petition, later sections show that their real quarrel is merely with the conclusions of the Commission in the exercise of its regulatory judgment, weighing conflicting factors one against the other. Such questions are of no general importance or of such substance as to

require review by this Court. This Court is not called upon to review the entire record as if on appeal.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October, 1943.

APPENDIX.

Section 1 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), Supp. II, Section 961, reads as follows:

> "That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effectlve prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Italics supplied.)

Section 302(c)(1-5) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. (App.), Supp. II, § 942 (c)(1-5), reads as follows:

> "(c) The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided, That nothing in this Act shall be construed to authorize the regulation of* (1) compensation

paid by an employer to any of his employees, or (2) *rates charged by any common carrier or other public utility*, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services." (Italics ours.)

Sections 2 and 7 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), Supp. II, §§ 962 and 967 read, in pertinent part:

"SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."

* * * * * * * * * *

"SEC. 7. . . . (c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section (2), or to invalidate any regulation, price schedule, or order issued or effective under this Act."

D. C. Code (1940) §§43-305, 43-306, 43-317, provide as follows:

§ 43-305.—The commission shall ascertain, as soon and as nearly as practicable, the amount of money expended in the construction and equipment of every public utility, including the amount of money expended to procure any right of way; also the amount of money

it would require to secure the right of way, reconstruct any roadbed, track, depots, cars, conduits, subways, poles, wires, switchboards, exchanges, offices, works, storage plants, power plants, machinery, and any other property or instrument not included in the foregoing enumeration used in or useful to the business of such public utility, and to replace all the physical properties belonging to the public utility. It shall ascertain the outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively, thereof, the date when issued, to whom issued, to whom sold, the price paid in cash, property, or labor therefor, what disposition was made of the proceeds, by whom the indebtedness is held, so far as ascertainable, the amount purporting to be due thereon, the floating indebtedness of the public utility, the credits due the public utility, other property on hand belonging to it, the judicial or other sales of said public utility, its property or franchises, and the amounts purporting to have been paid, and in what manner paid therefor, and the taxes paid thereon. The commission shall also ascertain in detail the gross and net income of the public utility from all sources, the amounts paid for salaries to officers and the wages paid to its employees, and the maximum hours of continuous service required of each class. Whenever the information required by this section is obtained it shall be printed in the annual report of the commission. In making such investigation the commission may avail itself of any information in possession of any department of the government of the United States or of the commissioners of the District of Columbia. (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 6.)

§ 43-306.—The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation. (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 7.)

§ 43-317.—Nothing in chapters 1-10 of this title shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device

shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of chapters 1-10 of this title. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement. (Mar. 4, 1913, 37 Stat. 980, ch. 150, § 8, par. 18.)

The pertinent provisions of Executive Order No. 9250 (7 Fed. Reg. 7871), promulgated on October 3, 1942, reads as follows:

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1943, entitled 'An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes,' as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

TITLE I—ESTABLISHMENT OF AN OFFICE OF ECONOMIC STABILIZATION

1. There is established in the Office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

. . . . . .

TITLE VI—GENERAL PROVISIONS.

* * * * * * * * *

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

* * * * * * * * *"

Resume of Legislative History of the Proviso to Section 1 of the Act of October 2, 1942.

The Act of October 2, 1942, is the result of legislation introduced in the House and Senate in September, 1942. The Senate legislation was introduced on September 14, 1942, by Senator Brown as S. J. 161, 77th Cong. 2d Sess. (88 Cong. Rec. 7361), and the House legislation was introduced by Mr. Steagall on September 21, 1942 as H. R. 7565, 77th Cong., 2d Sess. (*idem*, p. 7477). Insofar as the legislative history of the proviso of Section 1 of the Act is concerned, the progress of H. R. 7565 is of no moment until it was amended in the Senate on September 30, 1942, by the substitution (*idem*, pp. 7899-7901) of the language S. J. 161 as it had been amended by the Senate on that date for the language of H. R. 7565 as it had passed the House on September 23, 1942 (*idem*, p. 7635); for it was not until then that the latter legislation contained any reference to public utility rates. Similarly, the legislative progress of S. J. 161 sheds no light on the legislative history of the proviso until Senator Norris, on September 30, 1942 (*idem*, pp. 7876-7877), introduced an amendment to that legislation which was the forerunner to the proviso as it was finally enacted.

On September 30, 1943, Senator Norris offered an amendment from the floor (*idem*, pp. 7876-7877) under the terms of which, after a slight modification from the floor (*idem*, p. 7878), Sec. 1 of S. J. 161, as it then stood, would be supplemented with the following proviso:

"*Provided*, That rates charged by any common carrier or other public utility on September 15, 1942, shall

not be increased without the consent of the President: *Provided further*, That nothing in this section shall be construed as affecting the power or authority of any Federal, State, or municipal authority or agency to reduce prices, rates, or charges subject to its jurisdiction, or to equalize the rates and charges of common carriers."

This amendment[22] was adopted by the Senator (*idem*, p. 7878).

Later on that same day—September 30, 1942—Senator Brown moved (*idem*, p. 7899) that the Senate amend H. R. 7565 as it passed the House by striking out everything therein after the enacting clause and inserting in lieu thereof the text of S. J. 161 amended. This amendment which carried with it Senator Norris' Amendment in the form quoted above, was agreed to (*idem*, p. 7899), and H. R. 7565 as thus amended, passed the Senate (*idem.*, pp. 7900-7901).[23]

Thereafter the Senator asked the House for a conference on H. R. 7565 as it was passed by the Senate (*idem*, p. 7901) and this was agreed to by the House on October 2, 1942 (*idem*, p. 7981). As a result of the conference, conferees on the part of the House (H. Rept. 2513, 77th Cong. 2d Sess.; 88 Cong. Rec. 7986-7987) and on the part of the Senate (88 Cong. Rec. 7969-7970) reported the bill in the form in which it was enacted into law as the Act of October 2, 1942 (*idem*, pp. 7979, 7992).

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[22] In line with Senator Norris' Amendment, the Senate, upon Senator Brown's motion, amended (88 Cong. Rec. 7881) Section 2 of S. J. 161 as it then stood to provide that the President could suspend clause 2 of Section 302(c) of the Emergency Price Control Act, which provided: "... nothing in this Act shall be construed to authorize the regulation of .... (2) rates charged by any common carrier or other public utility; ..."

[23] Section 2 of the bill, after the amendment, read in part as follows (88 Cong. Rec. 7900): "The President may suspend the provisions of ... clause 1 and *2 of Section 302 (c)* of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof." (Italics supplied.)

So far as concerns proviso to Section 1 of the Act, this means, of course, that the proviso was changed in conference from the language in which it, as Senator Norris' amendment, had passed the Senate (see p. 26, *supra*) to the language appearing in the Act (see p. 22, *supra*).[24] The reason for the change in the language of the proviso to Section 1 and the effect of the language adopted was the subject of a somewhat lengthy discussion on the floor of the Senate after Senator Brown, a co-sponsor of S. J. 161 and a conferee for the Senate on H. R. 7565, had submitted the conference report to the Senate.[25] The pertinent part of this discussion, which was led by Senators Brown and Norris, reads as follows:

> "Mr. Brown. Mr. President, section 1 of the conference report follows section 1 of the Senate bill; in fact, I can say that very generally the conferees adopted the Senate bill with some slight modifications. The principal change in section 1 is that the Norris amendment which gave the President an all-over control of public-utility and common-carrier rates is stricken from the bill. There is substituted for it a provision which will require any public utility which asks for an increase in rates to notify the President and to assent to the appearance of such agent as the President may designate to appear in behalf of the consuming public before the appropriate railroad or public utility commission, be it a State, Federal, or municipal commission. (88 Cong. Rec. 7970.)
>
> * * * * * * * * *
>
> "It was felt by the House conferees that inadequate consideration had been given to the general subject matter, and they were unwilling to accept the Senate amendment. They were unanimous in their views;

[24] Also in conference, the power given to the President in Section 2 of H. R. 7565 (as amended in the Senate) to suspend Clause 2 of Section 302(c) of the Emergency Price Control Act (see n. 23, *supra*) was removed (cf. Section 2 of the Inflation Control Act, p. 23, *supra*).

[25] The House debate on the proviso (88 Cong. Rec. 7980, 7990, 7991), is meager and of no particular value.

and it was impossible for us to persuade them to accept the Norris amendment. However, the conferees did make the arrangement which I have indicated and which was entered into after some consultation with the senior Senator from Nebraska. We told him we thought this was the best we could get on this subject matter. (*Idem*, p. 7971.)

* * * * * * * * * *

"Mr. Norris. Mr. President, I wish to refer to the action of the conference committee in including in the conference bill the language which the Senator from Michigan read and which takes the place of the amendment offered by me when the measure was before the Senate for consideration. It relates to utility rates and charges.

"What has been substituted by the Conference Committee for the original language agreed to by the Senate does not, technically, afford any relief whatever, although, morally, I think it will result in considerable relief.

"I intend to vote for the conference report, but I wish to call attention to the legal effect, as I understand it, of the language which has been substituted.

"The committee has provided that no utility rate shall be increased unless 30 days' notice shall be given the President by the corporation seeking the increase. There is also the requirement that in the notice it shall be agreed that the President may have the right, through any instrumentality he may select, to appear before the body having jurisdiction of the rate. I think I have stated the legal effect correctly.

"Mr. Brown. The Senator has stated it correctly.

"Mr. Norris. That does not give the President any right to pass on the question. It does not give him any right to appeal in case the Board's decision is against his representative's ideas.

"Mr. Brown. I would not be sure, if the Senator will pardon me, that his last statement is in accord with my own views. I think he would have the same right to appeal that any other interested party would have.

"Mr. Norris. I did not look at it that way. If he would have that right, it would add a great deal to the

legal effect of the language which has been placed in the measure.

"Mr. Brown. He becomes a party to the proceedings, that is, his agent does.

"Mr. Norris. Yes, he does. The Senator's idea is that if under the law and the rules and regulations of the body having jurisdiction to hear the complaint, or the request, as it would be, an appeal is provided for, the President could avail himself of that right of appeal.

"Mr. Brown. Yes.

"Mr. Norris. I hope that will be the construction placed upon the language.

"Mr. Bone. Mr. President, will the Senator yield?

"Mr. Brown. I yield.

"Mr. Bone. I am assuming in asking the question that even though the President's representative would be technically a party in an appeal, he would merely have the right formally to present his views, or the views of the administration, to the regulatory body, but he would have nothing to say about its decision. If its decision were that the increase in rates should be granted, the decision would be final.

"Mr. Norris. If the Senator from Michigan has the correct idea, the President or his representative would have the right to appeal, as any party to the dispute would have the right to appeal.

"Mr. Brown. But with absolutely no authority to participate in the decision.

"Mr. Norris. No; with no authority to participate in the decision.

"Mr. Bone. That is what I meant by my question.

"Mr. Norris. As I said, I think that would have a great moral effect. The only thing the President's representative could plead for or urge when he appeared at the hearing would be that if the body then hearing the dispute should increase the rate, it would very likely interfere with all that the Price Administrator had done in the fixing of prices, because no one will dispute the utility rates enter directly into the cost of living. If gas rates, or electric rates, or water rates, or freight rates, or streetcar rates are increased, every single item of increase goes directly into the cost of living and hence interferes with any attempt to prevent inflation. After all, that is why I am deeply interested in this proposi-

tion; I want to prevent inflation, if possible. That is the object of our giving someone the authority to fix prices and freeze them at a certain level. If any persons or corporations have the power to increase any item of the cost of living, and it is done contrary to the order of the President or the Price Administrator, it will tend directly to overthrow the prices so fixed and will throw the whole structure out of gear, thus tending to increase the cost of living, and making it necessary to increase all other prices which enter into the cost of living, with the result that, as I believe, inflation will follow immediately.

"There would be a moral effect, however. When the President's representative appears before the tribunal having jurisdiction to fix or increase utility rates, he could say—and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation. If the tribunal increased utility rates during the war, notwithstanding the kind of showing made by the President's representative, it would in my judgment have a great effect upon public sentiment. The tribunal board, or commission which acted to increase rates, in the face of a showing that such action might lead to the worst kind of inflation, would find itself in a position which no board would want to be in. I think the provision in question will have a great moral effect. Therefore, I myself feel disposed to accept this language and vote for the conference report.

"Mr. President, I think I realize as fully as does any other Senator the earnestness, the fidelity, and the good faith with which the conferees on the part of the Senate have labored. We are all anxious to get through with this measure, and I think we should all be willing to sacrifice something we believe ought to be in the measure in order to have it finally passed. For that reason I do not believe we are justified in rejecting the conference report simply because in some particular it has not met completely with our ideas." (*Idem*, pp. 7973-7974.)

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OCT 25 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 396

FRED M. VINSON, Director of Economic Stabilization, by Prentiss M. Brown, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by Prentiss M. Brown, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

PRENTISS M. BROWN, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

PRENTISS M. BROWN, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

Brief of Respondent, Public Utilities Commission, in Opposition to Petition for Writ of Certiorari.

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DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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COUNTER STATEMENT

On December 13, 1935, the Public Utilities Commission of the District of Columbia (the "Commission") promulgated Order No. 1458, (R. I, 252) providing a sliding scale arrangement for the annual determination of rates for gas service pursuant to the provisions of Paragraph 18 of its Act (37 Stat. 980, Title 43-317 D. C. Code, 1940 Edition; R. I, 246). The plan was promulgated after 3½ years of investigation that cost $750,000 (R. II, 443). It provides for the annual adjustment of rates for each "rate year" to begin September 1, (R. I, 252) based upon the operating expenses for the "test year" ending June 30 preceding the new "rate year". (R. I, 253) The basic elements of the plan consist of (1) the method of establishing the rate base for each year; (2) the method and rates of computing annual accruals for retirement reserve; (3) the primary rate of return; and (4) the method of determining the amount available each year for rate increase or decrease. There have been reductions in rates in each year since the plan was adopted except the years 1937 and 1941, when no changes were made (R. II, 428).[1]

Pursuant to the provisions of the sliding scale, the Commission on March 20, 1942, issued its statutory order of investigation "in conformity with the sliding scale arrangement" (R. I, 33, 39), and on July 21, 1942, pursuant to statutory requirement, issued notice of the hearing to be held "in accordance with the sliding scale arrangement established by Order No. 1458" (R. I, 34).

Both Petitioners were interveners in the proceedings before the Commssion. The Price Administrator was represented at the pre-trial conference (R. II, 429; R. I, 61, 84) and throughout all subsequent hearings (R. I, 40, 253; R. II, 429).

Hearings were concluded and the record closed on September 14, 1942 (R. I, 181), and the parties filed briefs on September

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[1] Rates were reduced under the plan by more than $800,000 in 1935. All the reductions have continued in effect since they were made. The order of October 13, 1942, increased rates for the first time under the plan.

25, 1942 (R. I, 62). Upon petitions of others, the Commission reopened the procedings and set further hearings for September 30, 1942, (R. I., 181) in which counsel for the Petitioners participated and filed a supplemental brief (R. I, 62, 181). The record was closed for the second time on September 30, 1942, prior to the October 2 amendment of the Emergency Price Control Act of 1942.

Clause (2) of Section 302 (c) of the Emergency Price Control Act of 1942 (56 Stat. 36, 50 U. S. C. App., Supp. II, Sec. 942 (c)), specifically excluded from the control and regulation by the Price Administrator, rates charged by common carriers or other public utilities. Clause (2) of Section 302 (c) reads as follows:

> "* * * That nothing in this Act shall be construed to authorize the regulation of * * * (2) rates charged by any common carrier or other public utility, * * *."

The Price Administrator had been permitted by courtesy to participate fully in the investigation ordered and with the request from the Chairman of the Commission that he present testimony—

> "regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding." (R. I, 123)

Other requests of like nature were made many times (R. I, 123, 126, 133, 138, 139-140, 143; R. II, 416, 417, 443).

On August 19, 1942, counsel for the Price Administrator requested and was granted a continuance to September 4th so that he could prepare for cross-examination and prepare testimony to be presented by him (R. I, 102, 104, 106, 107, 110, 111). He cross-examined all witnesses and presented testi-

mony through three witnesses (R. 1, 151, 158, 169) and filed two briefs (R. I, 62, 181).

The Commission took under consideration the record and the briefs and on October 13, 1942, issued its findings and opinion and Order No. 2401 (R. I, 39-57). In the meantime, the Emergency Price Control Act was amended October 2, 1942, by Public Law 729, 77th Congress (56 Stat. 765, 50 U. S. C. A. 961). Section 1 of the amendment of October 2 provided that no common carrier or other public utility "shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency".

Section 2 of the amendment of October 2 provided that the President may suspend Clause (1) of Section 302 (c) of the Emergency Price Control Act, "but he may not under the authority of this Act suspend any other law or part thereof". The President was not given the authority to supend Clause (2) of Section 302 (c), which denied to the Price Administrator the regulation of common carrier or other public utility rates.

Under the terms of the sliding scale arrangement, rates become effective with the "rate year" beginning September 1, but the Commission directed the utility's attention to the requirement of Section 1 of the amendment of October 2 in the following language:

> "However, the Commission directs the attention of the Company to the provision contained in the Act approved October 2, 1942, entitled * * *." (R. I, 56).

The Commission then set out in its order, the language of Section 1 of that Act.

On October 15, 1942, in compliance with the direction contained in the Commission's order and the provisions of the Act of October 2, the Washingtin Gas Light Company (the "Company") served notice upon the Director of Economic Stabilization (the "Director") of the proposed increase in rates and

served upon him a copy of the Commission's order as well as a copy of Order No. 1458, promulgating the sliding scale (R. I, 187-190). On November 16, 1942, 30 days after notice to the Director, the Company put the new rates into effect as of that date. (R. II, 429, 430, 431).

On October 19, 1942, the Price Administrator on behalf of the Director filed a petition asking (1) that the Commission vacate the order of October 13; (2) that the proceedings be reopened; (3) that the Director be allowed to intervene in the proceedings, and complained that the issuance of the order, without permitting him to intervene denied him

> "his right to appear in this proceeding for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities."

Accordingly, the Commission on October 23, 1942, (R. I, 60-63) reopened the proceedings for the second time and granted the Director the right to intervene and set the matter for further hearing on November 2 (R. I, 63)—

> "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stablization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose." (R. I, 62-63).

At the reopened proceedings, the same counsel for the Price Administrator who had participated in all previous proceedings and filed two briefs appeared for the Price Administrator on behalf of the Director. Counsel for the Petitioners called no witnesses but again renewed his motions to have the Com-

mission depart from the investigation ordered by it and to re-examine and to reconsider the sliding scale plan. The Commission denied the motions and requested counsel to present testimony in accordance with the petition of the Director and its order reopening the proceedings (R. I, 215, 218). He offered no testimony in response to that request, but again asked the Commission to vacate the order of October 13 and said that was the basic issue, using this language, "The basic issue here is the question of the revocation of the Commission's order" (R. I, 220). Counsel for the Petitioners asked for a continuance until November 4 for the purpose of permitting him to consult with his associates to see what further steps would be taken in the proceedings. (R. I, 215, 216, 217, 218, 220).

When the hearings reconvened on November 4, counsel for the Petitioners again renewed his motions to re-examine and reconsider the basic elements of the sliding scale plan and, upon denial by the Commission, he called to the witness stand an official of the Company for further cross-examination about a computation presented in August. He offered no other testimony(R. I, 183-229).

No testimony was offered "concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942," nor "the effect thereon of increases in rates and charges of common carriers or other public utilities." (R. I, 220-229; Transcript 969-1149).

Counsel for the Petitioners asked the Commission to review, reconsider, and revise the basic elements of the sliding scale plan by changing (1) the method of determining the rate base; (2) the method of computing annual accruals for retirement reserve; (3) the primary rate of return; (4) to disallow certain operating expenses; and (5) to permit them with "no strings or restrictions" attached to go into any issue relating to rate-making "regardless of the terms of the sliding-scale arrangement." He asked that he be permitted to go into any question, "without restriction as to the type of evidence to be

presented or otherwise limiting the scope of further hearings to be held in this matter." He asked the Commission "to throw the case wide open." (R. I, 38, 65, 106, 107, 127, 149, 151, 167, 200, 206, 207, 209, 210, 228; R. II, 345-346, 417, 440-441).

The statutory order instituting the investigation and the statutory notice did not call for a re-examination, reconsideration and revision of the provisions of the sliding scale. On the contrary, both called for the annual investigation in conformity with the sliding scale arrangement. The Commission refused to change and enlarge the issues and to broaden the scope of the hearings and ruled that the proceeding would be conducted pursuant to the terms of the order and the notice. (R. I, 97, 106, 121-123, 132).

The Commission's Rules of Practice and Procedure provide it may grant or deny a petition for leave to intervene or may grant it "upon such conditions and limitations as it may prescribe." The Rules provide that granting such a petition "shall not have the effect of changing or enlarging the issues in the proceeding" except when such change or enlargement "is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties." (R. I, 251, 252). The petitions to intervene before the Commission did not expressly request a change or enlargement of the issues (R. I, 34-37; 57-60).

The Act creating the Commission provides it shall have power to adopt reasonable and proper rules and regulations relative to investigations made by it "and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it." (R. I, 248). The statute requires the Commission to advise the utility of matters under investigation that require formal hearings. It requires the Commission to give the utility ten days' notice of the time, place, and the matters to be heard. The notice

may not be issued sooner than ten days after the utility has been advised of the matter under investigation. No order affecting rates may be issued without a formal hearing (R. I, 247-248).[2]

The calculations made by the Commission's staff showed that under the sliding scale, the Company was entitled to a rate increase of $324,718.06; the Company's computation indicated an increase of $381,597. The difference in the calculations was due to adjustments in operating expenses and taxes. (R. I, 254; R. II, 435). In the light of existing conditions and to prevent any inflationary effect which such allowance would invite, the Commission disallowed as operating expenses all excess profit taxes and Federal income taxes greater than 31% of the Company's tax liability (R. I, 258, 261-262; R. II, 436, 438). After giving consideration to all factors (R. I, 254, 262, 265; R. II, 437, 438), including economic conditions due to the war (R. II, 435), the Commission reduced the computations under the sliding scale by $123,293.32 below that made by the Commission's staff (R. I, 266; R. II, 429) and found the Company was entitled to an increase in rates which would produce $201,424.74 (R. I, 265, 268; R. II, 429). The rate schedules put into effect increased rates by $200,141[3] (R. I, 266). Petitioners did not question the calculations under the plan (R. II, 392).

The total increase for all customers was 2.28% in excess of rates in the preceding rate year (R. I, 267; R. II, 438). Domestic consumers using 2500 cubic feet or less per month

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[2] Paragraph 7 of the statute (37 Stat. 978, Title 43-306 D. C. Code) provides "That the Commission shall value the property of every public utility—at the fair value thereof at the time of said valuation." Paragraph 8 provides that before holding a public hearing in a valuation proceeding, the Commission must give the utility "notice of not less than thirty days".

The proceedings leading up to the basic valuation prior to the establishment of the sliding scale plan began in March 1932. The order of final determination was issued March 19, 1935, after 3 years of inventory, appraisal, investigations and public hearings, without litigation in the courts. Further investigations and hearings were held in the establishment of the sliding scale. A new method of establishing the rate base and rates of depreciation, and a determination thereon, would defeat the annual adjustment of rates now accomplished under the sliding scale plan.

[3] See footnote (4) on page 9.

had no increase in their rates. The Commission found that the cost of gas constitutes only 1.17% of the average cost of living in Washington and that the increase in rates would increase the cost of living index by only about 1/37th of 1%. The Commission found that such increase would not have material inflationary tendencies. (R. I, 267; R. II, 438).

To guard against the possibility of increase in rates that might result in the liability for excess profit taxes in the new rate year derived from the rate increase authorized, the Commission incorporated in its order a provision that if the increased rates should impose a liability for excess profit taxes, any such amount should be recorded in a specially provided deferred credit account and refunded to consumers [4] (R. I, 56-57).

During the year 1942, the Company had a wage rate increase of about 16%, resulting in wage increases of $380,000 [5] (R. I, 109, 110, 264).

The two interveners appealed from the Commission's order. The Company took no appeal and made the rates effective November 16, 1942. The appeals of the interveners complained they had not been given "the opportunity of full intervention" and "a full and fair opportunity to be heard" because the Commission refused to change and enlarge the issues and broaden the scope of the hearing (R. I, 3-6, 237-240). The District Court denied motions to dismiss the appeals and vacated the Commission's order. Both the Commission and the Company appealed from that judgment.

The United States Court of Appeals for the District of Columbia found that "the order of the Commission was issued only after a deliberate and a careful study of the factors

[4] As a result of this provision of the order, the Company refunded to its customers $38,000 of the authorized increase and thereby reduced the net increase to $162,000.

[5] The wage increase suffered by the Company during the year was approximately $218,000 more than the rate increase after the refund referred to in footnote (4) was made. The publicly announced policy of the Price Administrator as well as the national policy in fixing commodity prices is to give effect to wage rates and the cost of production. If the Commission had considered increase in wages alone, it would have been justified in authorizing an increase in rates far in excess of the amount ordered by it.

affecting the business of the utility in war-time Washington, without a trace of hasty or arbitrary conduct on the Commission's part." (R. II, 438) The Court said the important issue in the case turns upon the action of the Commission in confining the rate investigation to an application of the sliding scale to prevailing conditions and a consideration of the possible inflationary effect of a price increase and in refusing a demand of the Price Administrator that a thoroughgoing examination be made into the rate base, the rate of return, operation expenses, and depreciation and all other matters relative to the establishment of a fair return (R. II, 431). The Court said the essence of the question raised by Petitioners is—

> "whether the Commission, as the regulatory body, or the Price Administrator, as intervener, should control the scope of the investigation." (R. II, 442).

The Court further found that there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates. It said:

> "The conflict arose when the Price Adminnistrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and re-examine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." (R. II, 443).

The Court of Appeals said a sliding scale arrangement "involves the basic elements of rate making, including a rate base, a fair rate of return and a correct determination of revenues, expenses and depreciation." (R. II, 439). It said the Price Administrator demanded "a full exhaustive examination into the rate base, the rate of return, the operating expenses and method of depreciation, and all other elements that usually enter into a utility rate investigation by a regulatory commission." (R. II, 440). It said "Indeed all of the subjects were so

tied together that no substantial change could be made in one without a survey of the entire field." The Court said that the Price Administrator requested the Commission to "undertake a revaluation of the Company's rate base." (R. II, 441).

The Court reversed the judgment of the District Court with instructions to dismiss the appeals from the Commission's orders (R. II, 443).

SUMMARY OF ARGUMENT

I. The facts of record demonstrate that the Petitioners, as interveners, sought to have the Commission depart from the investigation instituted by it and to change and enlarge the issues and to broaden the scope of the hearing. Interveners have no such right. Intervention must be in subordination to and in recognition of the main proceeding.

The statute authorizes the Commission to adopt rules to regulate the conduct of its investigations and hearings. The Commission's rules do not permit a change or enlargement of the issues except when expressly requested and expressly granted. The regulatory agencies are free to fashion their own rules of procedure and determine the method of making their inquiries and to control the range of their investigations.

II. The Commission complied with all statutory requirements and its Rules of Procedure. Its determination was made pursuant to statutory authority and is supported by substantial evidence. The Commission could not grant the request to revise the sliding scale plan under the order of investigation without violation of the statute. Failure to grant the request did not give Petitioners a cause of action.

III. Before the increased rates were put into effect, the Director was given thirty days' notice and consent was given to his intervention. The Petitioners were given full and complete opportunity to be heard on all issues before the Commission, which opportunity they exercised. The Act of October 2 was complied with in letter and spirit. Petitioners abandoned the purpose for which

the proceedings were reopened, and they have no cause to complain of a lack of a fair hearing. Notice with liberty to contest the facts and to disclose pertinent and material facts is such a hearing as one is entitled to have under the law. Limiting the scope of the proceeding to the order of investigation and notice of hearing is not a denial of a fair hearing.

IV. The Commission gave careful study and consideration to all factors. It made ample findings based upon the evidence of record and stated the reasons for its determination. Legislative findings of an administrative agency made after a full hearing and predicated upon the record, may not be disturbed. Rate-making calls for the exercise of enlightened judgment and discretion of a qualified and experienced body. Legislative discretion extends to the method used in reaching a legislative determination, as well as that determination itself. Congress has committed rate-making to the informed judgment and discretion of the Commission.

ARGUMENT

I

Intervenors May Not Compel a Regulatory Body to Change and Enlarge the Issues and Broaden the Scope of the Hearing.

The record, as shown by the counter statement, demonstrates clearly that what Petitioners sought before the Commission was to have it depart from the order of investigation instituted by it and to re-examine, reconsider, and revise the provisions of the sliding scale plan and to broaden the scope of the hearing for that purpose. Their complaints in the Courts below were that because the Commission refused to change and enlarge the issues and broaden the scope of the hearing for such purpose, they were denied a fair hearing. The real question presented by the petition is whether the Petitioners, as interveners, may control the scope of the investigation and hearing.

Intervention may not change or enlarge the issues and should not be permitted unless it is in subordination to and in recognition of the propriety of the main proceeding.

Chandler & Price Co. v. *Brandtjen & Kluge*, 296 U. S. 53;
Baxter v. *McGee*, 82 F (2) 695 (certiorari denied 298 U. S. 680);
Thorn Wire Hedge Co. v. *Fuller*, 122 U. S. 535, 30 L. Ed. 1235.

Paragraph 32 of the Commission's Act (37 Stat. 982, Title 43-402, D. C. Code, 1940 Edition), (R. I, 248) provides that the Commission shall have power to adopt rules and regulations relative to all investigations and to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings before it. The Commission's Rules of Practice and Procedure (R. I, 251-252) provide that the granting of a petition to intervene shall not have the effect of changing or enlarging the issues, except where such change or enlargement is expressly requested in the petition and is expressly granted.

This Court has said that regulatory bodies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties, and "to control the range of investigation".

Federal Communications Commissioin v. *Pottsville Broadcasting Company*, 309 U. S. 134;
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, this Court said:

> "The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself."

See also, *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; and *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575.

II

The Complaint of the Interveners Did not State a Cause of Action.

The Commission complied with all its statutory requirements and acted within its rules. The sliding scale plan is authorized by law, and the determination made in pursuance thereof is supported by substantial evidence. The Petitioners sought to cause the Commission to review the basic elements of the sliding scale plan and to revise the provisions thereof. This could not be done under the order of investigation or notice of hearing, and to have done so would have been in violation of statutory requirements. The failure of the Commission, therefore, to comply with the request of the Petitioners did not give the Petitioners cause of action.

Utah Fuel Co. v. *National Bituminous Coal Commission*, 306 U. S. 56;

Powell v. *United States*, 300 U. S. 276.

III

The Act of October 2, 1942, was Complied with, both in Letter and Spirit.

The Emergency Price Control Act of 1942 expressly denied the Price Administrator the right to regulate rates charged by any common carrier or other public utility (R. I, 249). The amendment of October 2, 1942, (in so far as pertinent here) merely provided that before a common carrier or other public utility shall make any general increase in rates which were in effect on September 15, 1942, it shall first give thirty days

notice to the President, or his designated agency, and consent to the timely intervention by such agency before the body having jurisdiction to consider such increase. The President was given the power to suspend certain provisions of the Emergency Price Control Act, but he was not given authority or power to suspend Clause (2) of Section 302 (c) which denied to the Price Administrator the right to regulate utility rates (R. I, 250).

The proceedings before the Commission were closed twice before the enactment of the amendment of October 2. The Commission issued its order on October 13, 1942, and directed the Company's attention to the requirement to give thirty days' notice prior to the increase in rates. Notice was served upon the Director on October 15, 1942 (R. I, 187-190; R. II, 429, 430), and the Company consented to the intervention by the Director (R. I, 191, 194; R. II, 431).

The proceedings were again reopened for the purpose of permitting the Director to present testimony in accordance with his petition for such purpose, and his counsel was requested by the Commssion (R. I, 215, 218), to present testimony in accordance with that petition and the Commission's order. Counsel abandoned the very purpose stated in the petition for reopening and granting intervention. He offered no testimony in respect of the comprehensive national economic policy and the effect thereon of increases in rates and charges of common carriers or other public utilities (R. I, 183-229). Petitioners abandoned the very purpose for which the proceedings had been reopened and intervention had been granted. They, therefore, have no cause to complain that they did not have a full and fair hearing.

Vandalia Railroad v. *Public Service Commission*, 242 U. S. 255;

Midland Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109.

"The right to a full hearing before any tribunal does not in-

clude the right to challenge or rely on evidence not offered or considered."

Federal Power Commission v. *Natural Gas Pipeline Co., supra.*

When one had full notice and appeared at the hearing with liberty to contest the facts and introduce any evidence *pertinent to the case*, with the right to a full and fair disclosure of the *material facts*, he has had such a hearing as he was entitled to have under the law.

Monongahela Bridge Co. v. *United States*, 216 U. S. 177.

When one has failed to take advantage of the opportunities offered him, he foregoes the right to question the propriety of the proceedings.

Alabama Power Co. v. *Federal Power Commission*, 75 U. S. App. D. C. 135, 128 F (2) 280 (Certiorari denied, 317 U. S. 652).

There was no failure to grant a fair hearing by limiting the scope of the investigation to the Commission's order and notice.

American Toll Bridge Co. v. *Railroad Commission*, 307 U. S. 486.

IV

Commission's Findings and Order are Supported by Substantial Evidence.

After hearings extending over many days from August 18 to November 4, 1942, and after careful study and consideration had been given to all factors having a bearing upon the questions presented (R. I, 254, 265), and "after weighing all factors to the best of our (its) ability" (R. I, 262), the Commission made its determination of the amount of rate increase that should be ordered. It considered the necessity for an increase

in rates because of the necessity of providing adequate service (R. I, 263-264) and found that an increase in rates in the amount of $201,424.74 was required. In its findings and opinion, the Commission discussed the evidence and stated its reasons for its findings, and set out in tabular form its determination and disposition of the amount by rate schedules (R. I, 265, 266).

Legislative findings of an administrative agency made after a full hearing will not be disturbed unless plainly shown to be overborne by the evidence.

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38.

"So long as there is warrant in the record for the judgment of the expert body, it must stand."

Rochester Telephone Corp. v. *United States*, 307 U. S. 125.

The structure of a rate schedule calls in peculiar measure for enlightened judgment which a rate-making body is qualified by training and experience to perform.

Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282.

The Commission is the body to whose informed judgment and discretion Congress has committed the determination of facts to support a rate order.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297.

The legislative discretion employed in rate-making power extends to the method used in reaching the legislative determination as well as that determination itself.

Los Angeles Gas & Electric Corp. v. *Railroad Commission*, *Supra.*

CONCLUSION

The Act of October 2, 1942, was fully complied with and it

is respectfully submitted that the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1943

No. 396

FRED M. VINSON, Director of Economic Stabilization, by CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF RESPONDENT WASHINGTON GAS LIGHT COMPANY.

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BRIEF OF RESPONDENT WASHINGTON GAS LIGHT COMPANY.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (R. II, 427-449) is reported at 137 F. (2d) 547. The opinion of the District Court (R. I, 15-20) is reported at 48 F. Supp. 703. The findings and opinion of the Public Utilities Commission of the District of Columbia (R. I, 39-57 and R. II, 271-317) are reported at 46 P. U. R. (N. S.) 1.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1943 (R. II, 451). The petition for writ of certiorari was granted on November 8, 1943. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code (as amended by the Act of February 13, 1925) 28 U. S. C. A. § 347a. See also D. C. Code (1940) § 43-705.

STATUTES INVOLVED

Section 1 of the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), Supp. II, Section 961, reads as follows:

> "That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide

for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Italics supplied.)

The pertinent parts of this and other statutes involved are set forth in the Appendix, *infra*, pp. 55-64.

STATEMENT

Washington Gas Light Company (hereinafter referred to as the "Company") was incorporated under Act of Congress in 1848 (9 Stats. 722) and since shortly after its incorporation has been continuously and is now engaged in the manufacture and distribution of gas to consumers in the District of Columbia. The Public Utilities Commission of the District of Columbia was created by Act of Congress on March 4, 1913 (37 Stats. 974), and continuously since that time it has been and now is the administrative body charged with the regulation of the affairs of public utilities doing business in the District of Columbia, including the Company.

Among other duties, the Public Utilities Commission is charged with responsibility for fixing the rates of public utilities within its jurisdiction (see D. C. Code, Section 43-301). In furtherance of this duty, the Act provides (D. C.

Code, Section 43-306) that "The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation." The Act provides further (D. C. Code, Section 43-317) that "a public utility, with the consent of the commission, may provide a sliding scale of rates. * * * Such arrangement shall be under the supervision and regulation of the commission."

Pursuant to its duties under Section 43-306 of the Code, the Commission in 1931 ordered an investigation of the Company to determine the value of its properties. On March 19, 1935, after prolonged hearings, the Commission issued its Order No. 1341, determining the value of the property of the Company as of June 30, 1932 (Tr.* II, 124). A similar order was handed down on the same date with respect to The Georgetown Gaslight Company (a wholly owned subsidiary, since merged with the Company) (Tr. II, 239). Following the issuance of the valuation orders, the Commission conducted hearings for the determination of the rates to be charged by the Company, and before these hearings were completed, the Commission and the Company entered into a sliding scale arrangement for the determination of gas rates, after a public hearing, pursuant to Section 43-317 of the Code (Order No. 1458, Tr. II, 256).

The sliding scale arrangement fixed a rate base (to be adjusted annually by adding net property additions at cost), a rate of return, and a rate for the accrual to the retirement reserve, and prescribed a method for the annual determina-

*Refers to original transcript of record filed in this Court.

tion of rates to be charged by the Company, which in effect resulted in reductions of rates when a return in excess of the basic rate of return was earned, and in an increase of rates when a return less than the basic rate of return was earned. It was provided by the sliding scale arrangement that rate adjustments should take effect on September 1st of each year and should be based on the operating results of the year ending the previous June 30th.

The duration of the sliding scale was not prescribed in Order No. 1458, but the Commission stated in such Order that it interpreted Section 43-317 of the Code to permit the termination of the sliding scale arrangement upon reasonable notice, and after finding that the sliding scale arrangement proposed was practicable and would be advantageous to all interested parties, the Commission found that ninety days' written notice of termination of the sliding scale arrangement by either the Commission or the Company would be reasonable (Tr. II, 268). No notice of termination of the sliding scale arrangement has ever been given, either by the Commission or by the Company.

At the time of the entry of Order No. 1458 in December 1935, the rates of the Company were reduced by approximately $850,000 per annum (Tr. I, 143). In each year subsequent to 1935, annual hearings under the sliding scale have been held, and these have resulted in further reductions of rates of the Company in each of the years 1936, 1938, 1939 and 1940 (Exhibit 11, R. II, 421). In 1937 and 1941 there were no reductions and no increases in rates. The year 1942 is the first in which the sliding scale called for an increase in rates. The effectiveness of the sliding scale is demonstrated by the ease and simplicity with which it operated prior to the 1942 proceeding. In each year hear-

ings were held during the month of August; they were completed within one or two days; and the Commission's findings and order were issued in ample time to make the new rates effective on September 1, as provided in the sliding scale arrangement.

During this period (1935-1942) the Company sold to the public substantial issues of its bonds and preferred stock, and a large block of the common stock of the Company had been sold in a wide public distribution (Tr. I, 2265). In the registration statements filed with the Securities and Exchange Commission as a basis for the issuance and sale of these securities, the sliding scale was fully described and the facility of its operation in the determination of rates was emphasized.

Such was the background of rate regulation of the Company under the sliding scale arrangement when in 1942 that arrangement approached its critical test, namely, whether it would be permitted to operate to increase rates, rather than to decrease them, as had been the case in the past. Was the sliding scale arrangement to be accepted only so long as it produced rate reductions, or was it to continue to furnish a stable and expeditious method of determining rates, whether such determination increased or decreased rates?

On March 20, 1942, the Commission issued its usual annual order directing that an investigation be made relative to the rates of the Company in conformity with the sliding scale arrangement (R. I, 33). During the period from April 1942 to August 1942, the usual detailed investigation of the Company's affairs was made by the staff of the Commission (R. I, 88), and on July 21, 1942 the Commission gave formal notice of the public hearing to be held in August (R. I, 34). On August 14, 1942 a prehearing conference was held, which was attended not only by the

Commission, its staff, and the staff of the Company, but also by Utilities Counsel of the Office of Price Administration (the same counsel who appeared throughout all of the proceedings subsequent to that date, and who argued the case in the United States District Court and the United States Court of Appeals). (R. I, 61, 73.)

The hearings commenced on August 18, 1942, and at that time the counsel for the Office of Price Administration filed his petition for leave to intervene which was granted (R. I, 34-37, 61, 73). Experts from the Commission's staff testified that the Company was entitled to a rate increase of $324,718.06 (R. I, 90, Ex. 1, Sched. 1, R. I, 230). The Company's computation indicated an increase of $381,597 (R. I, 103, 233, Ex. 2). Throughout the hearing, counsel for the Office of Price Administration insisted that the scope of the proceedings be enlarged to permit a detailed investigation of the elements of the sliding scale arrangement itself, including the rate-base, rate of return and rate of depreciation accrual. The Commission declined to enlarge the scope of the proceedings but repeatedly invited the presentation of evidence regarding the national price control program and the possibly inflationary character of an increase in rates (R. I, 123, 133, 138-139, 145-146).

The hearings were closed on September 30, and on October 13, 1942, the Commission issued its opinion and order, Order No. 2401, in which it approved a rate increase of $201,424.74 and in which it prescribed new rates effective September 1, 1942 (R. I, 39-57). (In fact, the new rates did not become effective until November 16, 1942.)

In the interim between the closing of the hearings and the issuance of Commission's opinion and order, the Stabilization Act of October 2, 1942 had been enacted by Congress. Pursuant to this Act, and promptly after

the issuance of Order No. 2401, the Company gave the requisite notice, on October 14, 1942, to the Director of Economic Stabilization, who had been designated to receive notices under the Act (R. I, 188). On October 19, 1942, the Price Administrator, on behalf of the Director of Economic Stabilization, petitioned (R. I, 57-60) the Commission for a reopening of the proceedings, vacation of the Commission's prior order (No. 2401), and for leave to intervene in the reopened proceedings, the Company consenting to such intervention (R. I, 191). The Commission thereupon, on October 23, 1942, issued its Order No. 2404 (R. I, 60) in which it granted the prayer that the proceedings be reopened, and granted the petition for leave to intervene for the purpose of receiving from the intervenor "additional evidence relating to the inflationary effect, if any, of the increase in rates".

In granting intervention in the reopened proceeding, the Commission acted pursuant to its Rule No. 7.3, which provides that the Commission may grant or deny intervention, and if it grants intervention may do so upon such terms as it prescribes. The Commission's rules (Rule 7.5) also provide that when leave to intervene is granted by the Commission the effect thereof shall not be to change or enlarge the issues in the proceeding.

At the reopened proceedings, which began on November 2, 1942, the Price Administrator on behalf of the Director of Economic Stabilization appeared by the same counsel who had represented the Office of Price Administration in the prior proceedings (R. I, 66).

Although the proceedings were reopened by the Commission for the purpose of receiving evidence on the inflationary effect, if any, of the rate increase authorized by

its Order No. 2401, such evidence was not forthcoming. However, counsel for the Price Administrator reiterated his contention that the scope of the proceedings should be broadened to include an investigation of the elements of the sliding scale arrangement. The Commission (Order No. 2418) characterized the reopened hearings as follows:

> "No testimony was adduced by the Price Administrator at the reopened hearing on November 2, and at the conclusion of the hearing on that date, counsel for the Price Administrator moved that the case be continued until 10 o'clock a.m. on November 4 in order to permit him to consult with his associates as to future steps to be taken in the proceeding. Accordingly the hearing was continued until November 4, at which time counsel for the Price Administrator presented evidence to show that the amount used by the Washington Gas Light Company for Federal income taxes in its determination of the amount available for increase in rates under the sliding scale arrangement was overstated by approximately $18,000.00. This was due to the fact that the Revenue Act of 1942 as finally approved contained a provision exempting from surtaxes that portion of the Company's income paid out as preferred stock dividends, which provision was not included in the draft of the bill upon which the original computation for income taxes was made. This was the only evidence offered." (R. I, 66, 67.)

Accordingly, on November 9, 1942, the petition of the Director that Order No. 2401 be vacated was denied. The Commission said (Order No. 2418):

> "The evidence adduced fails to show that the rates authorized by Order No. 2401 are inflationary." (R. I, 67.)

The new rates prescribed by Order No. 2401, although effective as of September 1, 1942 as provided in the sliding scale arrangement, were not actually charged by the Company until November 16, 1942, more than thirty days after the Company's notice to the Director of Economic Stabilization of October 13, 1942. The new rates were not charged retroactively to September 1, 1942.

The record shows that representatives of the Office of Price Administration and of the Director of Economic Stabilization were present at every hearing of the Commission, presented briefs to the Commission, requested and received adjournments, cross-examined witnesses, and participated in the hearings, as though parties to the proceedings.

The petitioners appealed from Order No. 2401 which had granted the rate increase referred to, and from Order No. 2404. (R. I, 2, 237). The appeal taken by the petitioners to the District Court was decided in their favor, and it was held there that the Commission's action had been "arbitrary and illegal" in refusing to make an investigation of the rate base, rate of return, and depreciation accruals as demanded by the petitioners (R. I, 18).

The Court of Appeals reversed the District Court and upheld the order of the Commission, holding (R. II, 427-449) that the Commission's discretion as to the scope of the hearing was unfettered by the Act of October 2, 1942 and the intervention of the petitioners. The Court held that the proceedings before the Commission had been fair and complete and that the petitioners had no standing to complain of the Commission's action. The Court said:

> "It is not reasonable to suppose that Congress intended to abrogate or repeal the powers so carefully

elaborated by giving the Price Administrator the right to compel a complete overhauling of the established practice of the Commission and the adoption of a new and different standard, when experience had shown that the prevailing practice was adequate to secure the objective of adequate service with a fair rate of return on the utility's investment.

* * *

"Our conclusion is that the refusal of the Commission to undertake such an investigation at this time, and in the meantime to ignore the reasonable needs of the Company, was not arbitrary or illegal, but was well within its lawful discretion." (R. I, pp. 442-443.)

The petitioners' brief contains misstatements of facts and is particularly erroneous in its frequent statement that the rate-base developed pursuant to the sliding scale arrangement is undepreciated. We do not deem these statements material to the issues on this appeal; however certain of them are corrected in detail later in this brief, *infra*, page 42 *et seq.*

SUMMARY OF ARGUMENT

We contend that the petitioners as intervenors and under the Stabilization Act of October 2, 1942 may not properly complain of the action of the Commission in fixing the rates of the Company. The petitioners were not denied a fair and complete participation in the hearing, if they were not authorized to require the Commission to examine anew the rate-base, rate of return and retirement accruals.

The Emergency Price Control Act of 1942 expressly denied any power to regulate public utility rates. (*Davies Warehouse Company* v. *Bowles,* No. 112, this term.) Its amendment, the Stabilization Act of October 2, 1942, did not give petitioners jurisdiction over utility rates, expressly denied them by the Emergency Price Control Act of 1942. This interpretation of the Stabilization Act is dictated by its language and legislative history; and is fortified by the consequences of the interpretation suggested by the petitioners.

The Commission's duty under its own statutes is to fix just and reasonable rates, and this it has done. The Commission was faced with the dilemma of preserving the simple and expeditious method of fixing rates in conformity with the sliding scale arrangement and at the same time giving effect to the war-time economy. This dilemma was resolved by granting a modified rate increase. Neither the Company nor the petitioners were satisfied with the Commission's action, but the rates fixed by the Commission are *presumed* to be "just and reasonable" (*Federal Power Commission et al.* v. *Hope Natural Gas Co.,* Nos. 34 and 35, this term, and the courts should not substitute their judgment for that of the Commission.

ARGUMENT

Introductory: This is essentially a controversy between two administrative bodies with respect to the regulation of public utility rates. The *method* of fixing these rates—not the rates themselves—is primarily at issue.

The Public Utilities Commission of the District of Columbia contends that it has the responsibility for fixing

rates and that it has the discretionary authority to decide what evidence is relevant in proceedings to fix rates and to determine the scope of such proceedings. Its powers and duties are substantially the same as those of public utilities commissions established by the laws of most of the forty-eight states. The petitioners, on the other hand, contend in essence, that, either by the Stabilization Act of October 2, 1942 or by their intervention, the discretion of the Commission as to the method of fixing rates was limited and that the Commission was not entitled to fix rates on the basis of a sliding scale arrangement previously made; although no claim was made that this arrangement should be abrogated or terminated according to its terms, and although the arrangement concededly greatly simplifies rate-making, reduces the cost thereof and eliminates the prolonged delays inevitable in rate-making by the orthodox process.

Petitioners seek to have the Commission's order vacated on the ground that the Company did not show that the increase was "necessary". They seek alternatively to have the case remanded to the Commission on the ground that the Commission did not accord them a fair and complete hearing because it refused to accede to their demands that it investigate anew the rate base, the rate of return and depreciation accruals.

The petitioners, of course, have no standing to complain of the Commission's action unless they are given such standing by the Stabilization Act of October 2, 1942, or by intervening in the proceeding. Thus the threshold question is one of statutory construction as to what powers, if any, were conferred upon the petitioners by that Act respecting the regulation of public utility rates. The second-

ary question is what right, if any, did the petitioners have as intervenors to enlarge the scope of the proceedings and to present issues not raised by the original parties. The third question is whether the Commission acted properly within its statutory powers in conducting the hearings and in fixing rates.

There is no doubt that the petitioners, as the designated agencies of the President, are given some rights by the Stabilization Act of October 2, 1942 in the matter of utility rates where prospective increases in such rates are involved. They are expressly given the right to receive thirty days' notice by the utility, and the utility is also required to consent to their intervention in proceedings before the regulatory agency. If they are permitted to intervene by the regulatory agency, their standing in the case is of course not a "formal" one or a "nominal" one. In this case they were accorded the usual rights of an intervenor (which we discuss, *infra*, pp. 28-31). They properly presented arguments in an attempt to influence the Commission's discretion and they were given the right and were encouraged to present evidence on the inflationary effect, if any, of the proposed rate increase.

It is the position of the Company, however, that neither the Stabilization Act nor the intervention by the petitioners eliminated the plenary power of the Commission in the fixing of public utility rates and that, while the petitioners were free to argue that the Commission should not follow the method of fixing rates provided by the sliding scale arrangement, if the Commission decided nonetheless to adhere to that method of rate-making, the petitioners have no just cause of complaint.

I

THE PROPER INTERPRETATION OF THE ACT OF OCTOBER 2, 1942

a. *Intervention.* The petitioners have no standing to question the Commission's actions unless it is given them by the Emergency Price Control Act or its amendment, the Stabilization Act of October 2, 1942, or by their intervention. The Emergency Price Control Act of 1942 expressly denies the Administrator any jurisdiction over the rates of public utilities (Section 302 (c), *infra*, page 57). The only Act, therefore, which the petitioners can claim to give them standing to complain of the action of the Commission is the Stabilization Act of October 2, 1942.

The clearest argument that that Act confers no extraordinary powers on the petitioners is contained in the language of the Act itself. The proviso clause upon which the petitioners rely reads as follows:

> "*Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

A literal interpretation of this language is that the utility must give thirty days' notice of an increase in rates and must consent to intervention by the Director or his representative. This does not give him a *right* to intervene. If Congress had intended to confer such a *right*, it would

have said so in unmistakable language. Thus, in the Act of August 24, 1937 to provide for intervention by the Attorney General of the United States in suits for injunction where there is drawn in question the constitutionality of an Act of the United States (50 Stats. Part I, 751) it is provided that the Court "shall permit" the Attorney General to intervene and to present evidence and to make argument. Here, while the petitioners did not have the *right* to intervene in the proceedings before the Commission, their intervention was permitted by the Commission; but as we show below, it is clear that by such intervention they did not acquire any larger privileges than those of an ordinary intervenor.

b. *Difference between Commodity Prices and Utility Rates.* If the Emergency Price Control Act of 1942 and the amendment thereto, the Stabilization Act of October 2, 1942, be examined it will be evident that the petitioners' arguments, that utility rate increases not "necessary" are outlawed, are untenable. The original price control measure expressly excluded utility rates from the definition of commodity prices (Section 302 (c) *infra* p. 57). It defined "prices" as the sales prices of "commodities" and then specifically provided that "commodities" must not be construed so as to include public utility rates. In the Amendment, the Stabilization Act, the President is authorized to stabilize "prices", and he is authorized also to adjust "prices" to prevent hardships and to render more effective the prosecution of the war. The language is obviously chosen with care. Three words are used, "prices, wages and salaries", all three defined by the original statute itself. Clearly such "prices" refers to prices of commodities which may be stabilized. Since the authorization to "adjust" refers to

prices that may be stabilized it is apparent from the Acts themselves that the standards for increases in prices apply only when prices for such commodities may be stabilized. Utility rates may not be stabilized and the standards prescribed in the Stabilization Act for increasing commodity prices therefore have no applicability.

In Section 2 of the Stabilization Act of October 2, 1942, the President is given the authority to suspend certain provisions concerning the definition of prices in the Emergency Price Control Act, but he is expressly denied the authority to suspend other provisions, among which is included the provision exempting utility rates. The pertinent sentence in the statute is vivid in its precision. It gives the President power to suspend *clause 1* of Section 302 (c) but denies him power to suspend "any other provision"; the utility rate provision is *clause 2* of that Section.

The statement in petitioners' brief (p. 59) that the stabilization program "cannot be confined to commodity prices" but must include utility rates, is in direct conflict with the Emergency Price Control Act itself. That Act covers fully commodity prices but expressly excludes utility rates.

It must be remembered that Congress, in enacting the stabilization laws, was acting with respect not only to the District of Columbia, but to all of the forty-eight States. In giving the Administrator control over *commodity* prices, Congress did not "supervene" State laws, or local regulatory agencies. Commodity prices generally have never been regulated by the States and there are no agencies whose approval is required for an increase. The reasons which prompted Congress to exclude public utilities from the Emergency Price Control Act, "to avoid para-

lyzing or extinguishing local institutions", existed with the same force when the Stabilization Act of October 2, 1942 was enacted. (See *Davies Warehouse Co.* v. *Bowles*, No. 112, this term.)

Unless a ceiling is put on commodity prices, there is no check over them and they may be increased *ad infinitum*, in accordance with the law of supply and demand. Utility rates, on the other hand, have been regulated for years by local regulatory agencies, and they cannot be increased without approval by such agencies. There is, therefore, a clear distinction between utility rates and the "function of a stabilization program" to stop rises in prices which result "when shortages in supply coincide with intense demand" (Pet. Br., p. 59). The reasons for stabilization do not apply to the utility industry, where prices have little or nothing to do with supply and demand (see Pet. Br., p. 57, *et seq.*). Thus, from the petitioners' own view of the purposes of the stabilization laws, there is no need for their application to the utility industry. Congress had this distinction clearly in mind when it expressly excluded utility rates from the Emergency Price Control Act of 1942 (*Davies Warehouse Co.* v. *Bowles*, No. 112, *supra*). It could not have overlooked this distinction when it required only notice, and a consent by the utility to intervention, in the Amendment of October 2, 1942. This was also the opinion of Mr. Henderson, former Price Administrator.*

*At the hearing in which the Bill later enacted as the Emergency Price Control Act of 1942, was under consideration, Mr. Henderson said:

> "Now, as to the utilities. There is, as members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations, and of State laws. It seemed to those draft-

This Court has recently discussed this very question (*Davies Warehouse Co.* v. *Bowles, supra*):

> "Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not."
>
> "Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation."

c. *Legislative History.* The legislative history of the Stabilization Act of October 2, 1942, confirms the fact that no extraordinary rights were intended to be given the Director. When the Bill was under consideration in the Senate, Senator Norris introduced an amendment forbidding increases in utility rates, unless such increases were approved by the President. This amendment passed the Senate but was rejected at the conference between conferees of the House and the Senate, and the provision requiring only notice and consent by the utility to interven-

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ing the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill."

(Hearings before House Committee on Banking and Currency—pages 54 and 55, August 6, 1941, H.R. 5479.)

tion (as subsequently enacted) was substituted (88 Cong. Record, pp. 7443, 7877-7878).

The Chairman of the Committee in charge of the bill in the Senate stated in respect to the substitution:

> "* * * the House conferees * * * were unwilling to accept the Senate amendment. They were unanimous in their views; and it was impossible for us to persuade them to accept the Norris amendment" (88 Cong. Record, p. 7971).

Senator Bone assumed that:

> "* * * though the President's representative would be technically a party in an appeal, he would merely have the right formally to present his views, or the views of the administration, to the regulatory body, but he would have nothing to say about its decision", (88 Cong. Record, p. 7974).

and Senator Norris said:

> "What has been substituted by the Conference Committee for the original language agreed to by the Senate does not, technically, afford any relief whatever, although, morally, I think it will result in considerable relief.
>
> * * * * * * *
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> "When the President's representative appears before a tribunal having jurisdiction to fix or increase utility rates, he could say—and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation. * * * We are all anxious to get through with this measure, and I think we should all be willing to sacrifice something we believe ought to be in the measure in order to

> have it finally passed. For that reason I do not believe we are justified in rejecting the conference report simply because in some particular it has not met completely with our ideas" (88 Cong. Record, p. 7974).

In view of these statements it is difficult to understand how the petitioners can now contend that the proviso clause as enacted accomplishes what Senator Norris hoped to accomplish through his proposed amendent which was rejected.

True, Senator Norris was "disappointed" at the rejection, but it cannot be assumed, as the petitioners suggest, that he did not know what he was talking about. When discussing the substitute provision on the Senate floor, he said that intervention would have a "moral effect". As the petitioners point out (Br. p. 76) when Senator Norris assumed that the President's representative would have no right to appeal, "Senator Brown promptly corrected this misconception". Clearly Senator Brown would have been equally prompt to have corrected a misconception of Senator Norris on the standing of the President's representative before the Commission.*

d. *The rights given to Petitioners by the Stabilization Act, after intervention, in proceedings before Regulatory Agencies for increase in utility rates.* The question naturally arises what position the President's representative has in the proceeding, once intervention has been granted to him. This question is partially answered by the petitioners' brief. They say (pp. 59, 60):

> "Some prices, some wages, and some rates must be allowed to increase, in the interest of obtaining

*The pertinent statements in the Senate discussing this particular question are set out in full in the appendix, *infra*, pp. 61-64.

> essential production. Failure to relieve such pressures may mean a loss in total national production or losses in certain fields which are important to the war effort."

Also (pp. 26, 27):

> "Not all rate increases are opposed by petitioners, or should be. If, without exception, rate increases were injurious to the national economy, no doubt Congress would have prohibited them flatly, but, just as Congress gave the President authority to authorize necessary adjustments in prices, wages, and salaries above September 15, 1942, levels, and just as the Senate proviso would have extended his authority to utility rate increases, so the intervention procedure supposes an increase in some utility rates above the September 15, 1942, level."

Thus, in the petitioners' own words, all rate increases are not inflationary and do not conflict with the Stabilization Act. What rate increases *are* inflationary and *do* conflict with the Stabilization Act? Obviously this question cannot be answered unless the regulatory agency knows what the national stabilization program is. The petitioners say (Br. p. 28):

> "Whatever the standards which may be formulated to govern rate increases under a wartime stabilization program, it is clear that they cannot exclude as irrelevant the true earnings and return realized by the utility."

According to this statement there are two evidentiary matters to be looked into. One is the "wartime stabilization program" and the other is "the true earnings and return realized by the utility". The earnings and return are mat-

ters with which the Commission is peculiarly competent to deal without assistance from the petitioners. The wartime stabilization program is a matter of which the Commission knows little, and on which evidence and assistance from the petitioners would be of value, and was repeatedly requested by the Commission during the hearings.

Local regulatory agencies, such as the Commission in this case, must be presumed to know or have access to the facts in regard to the utility whose rates are in question. They must also be presumed to know conditions under which the Company is operating. They do not need the President's representative to introduce evidence for their use and inform them on these matters. This is primarily the function of the Commission's staff. They do not know, however, the economic program of the Federal Government or whether and to what exent, if any, the proposed increases in rates are in conflict with the national economic program. It is here that the Federal agency can assist them.

That Congress did not intend to supersede the State laws for the regulation of public utilities is clear from the Act itself, but in addition this Court has said unequivocally that such an intent cannot be ascribed to Congress:

> "In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress *did not intend*, and certainly has given no clear indication that it did intend, *to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility.*" (*Davies Warehouse Co.* v. *Bowles, supra.*) (Italics supplied.)

This being the intent of Congress in enacting the Stabilization Act, the petitioners would be authorized to present evidence, not on the ingredients of rate-making, but on the subject of the national price stabilization program and the effect *thereon* of the proposed increase. This is, after all, an important function; its importance is demonstrated by the weight accorded it by the Commission in this case, in diminishing the amount of the increase to about two-thirds of the amount shown by its own staff to be due.

e. *The Issue—Control over the Proceedings.* The petitioners say (Br. p. 25) that the Commission was required "to accept and consider relevant evidence proffered by them and, so far as practicable, to determine all substantial issues raised by them relating to the utility's claim to an increased rate". This statement, it should be noted, is qualified by the word "relevant". Who is to determine whether the proffered evidence is "relevant" or not? Here the Commission decided that evidence concerning the rate-base, the rate of return and depreciation was not relevant. The petitioners contended otherwise.

If the relevance of the evidence is to be decided by the petitioners and if the Commission is under a duty to accept and consider such evidence, then the petitioners necessarily have been given the power to control the method to be used in establishing the rates of utility companies. For example, the theory of allocation of property between service within and service without the District of Columbia followed by the Commission for years has been that of the gas actually used. If the petitioners contend that the allocation should be on the basis of revenue, such evidence would have to be received and considered by the Commission. Similarly, in Massachusetts the theory consistently followed by the State

Commission for a number of years has been to determine the prudent investment in the company and to fix rates accordingly. If the petitioners are authorized by the Stabilization Act to compel the Massachusetts Commission to "accept and consider" evidence on the "fair value" of the utility, such determination either would be of no use to the Commission or it would violate the principles the Commission has followed.

If a Commission is compelled to "accept and consider" evidence on any question that the *petitioners* believe relevant the Commission must hear and consider evidence, if it is tendered by the petitioners, on questions such as the price paid by the company for its raw materials, salaries paid by it to its officers and other matters purely within the domain of management.

If the Commission made an investigation of the rate base and of the rate of return, as urged by the petitioners, the probable result would have been an abrogation of the sliding scale plan and a return to the great expense and delay incident to orthodox rate regulation, which has been frequently the subject of criticism*. Nothing could be more

*For example, Mr. Justice Brandeis stated in his concurring opinion in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 88, 93 (1936):

> "* * * The greater delay, and the cost, in rate investigations affecting the larger utilities, is illustrated by cases which have come before this Court in recent years.
>
> * * * * *
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> "Surely, all must agree with the Secretary of Agriculture that: 'If rate regulation is to be effective, there must come at some time an end of hearings and a decision of the questions involved.' In *Chicago, Burlington & Quincy Ry.* v. *Babcock*, 204 U. S. 585, 598, we said of valuations made by the State Board of Equalization and Assessment: 'Within its jurisdiction, except as we have said, in the

discouraging to regulatory body which had designed an expeditious and fair method of rate-making for the purpose of avoiding this criticism and defect.

As we have said before, in enacting the Stabilization Act, Congress was not passing legislation intended for the District of Columbia alone. It passed a law affecting prices throughout the country and did not intend to amend, supersede or interfere with the utility regulatory laws of the various States or the District of Columbia. *Davies Warehouse Co.* v. *Bowles, supra.*

f. *Conclusion.* We are concerned here not with what Congress might have done nor what the petitioners wish

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case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end.' Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise."

In *McCart et al.* v. *Indianapolis Water Co.*, 302 U. S. 419 (1938), Mr. Justice Black, dissenting, also points out the circuitous and lengthy trail of such litigation, starting at p. 423 and stating:

"In the delays incident to rate litigation it is probably true that prices will fluctuate many times between the beginning of a litigation and the time when the cause is won, lost or abandoned.

"It has now been more than five years since the commission fixed a valuation for this water works property

Congress had done, *but with what Congress intended by enacting the Stabilization Act.* The fact is that Congress did not intend the Stabilization Act of October 2, 1942 to confer any extraordinary power over utility rates upon the petitioners. This conclusion is further strengthened by arguments which the petitioners themselves make. They say that Senator Norris was "disappointed" over the substitution in conference of the proviso clause as enacted for his proposed amendment giving the President a "veto" over utility increases, and that his remarks were in "disparagement" of the substitute (Br. p. 75). What reason did

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and it has been more than four years since the master reached his conclusion. If it requires four more years for this case to return to the Court of Appeals, there can be no doubt but that some price index can be found to show other changes in prices. Such a result will add still further to the confusion and chaos of judicial rate making. I believe it forecasts a day when the present long delays in rate regulation will be endless.

"The City of Indianapolis should not be subjected to another trial unless this Court believes the rates to be confiscatory (pp. 426-7).

* * * * *

"I believe this cause should be brought to a conclusion at this time. * * * See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 16; also *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 420 (p. 427).

* * * * *

"This case is an illustration of the almost insuperable obstacles to rate regulation today. It involves a single Company supplying water to a single community. It does not present the difficulties of a far-flung utility system covering much territory with many separate corporate creatures. Nevertheless, this particular case has already consumed more than six years and is apparently destined to remain suspended for six more years. More than 2000 pages of records and exhibits appear in this Court in the appeal" (p. 435).

Senator Norris have to be disappointed if the change was of no "relevance", as petitioners contend? The petitioners also argue that the Stabilization Act "imposed a duty on regulatory authorities" (Br. p. 75), and that this "duty" was to approve no rate increases which were not "necessary". If this is so, what need for intervention by the President's representative? The intervention, in such case, then in truth would be only "nominal" or "formal".

Congress meant that when an increase in utility rates is proposed in wartime, the petitioners must be notified so that they may seek the opportunity to explain to the regulatory authority the nature, extent, exceptions, intricacies, purposes and effects of the national stabilization program. That responsibility is a task of substance, not a mere formality.

II

THE PETITIONERS AS INTERVENORS CANNOT ENLARGE THE ISSUES AT THE HEARING AND THEY WERE AFFORDED A FAIR AND COMPLETE HEARING BY THE COMMISSION.

a. *The position of an intervenor.* Petitioners contend that the position of intervenors in the proceedings both before and after the enactment of the Stabilization Act of October 2, 1942, entitled them to broaden the scope of the proceedings and to examine in detail the elements of the sliding scale arrangement itself.

An intervenor is not entitled to such privileges as a matter of right.

In *Chandler Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 58, 59 (1935), the court stated:

> "Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties.
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> * * * * * *
>
> "Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill."

In *United States* v. *Northern Securities Co., et al.*, 128 F. 808, 813 (1904), the court stated:

> "Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried."

The Stabilization Act of October 2, 1942 does not require that the Commission must permit intervention by the designated agencies of the President. It only specifies that the utility must consent to intervention. If Congress had intended the intervention to be mandatory, it would have said so clearly, as it has in other cases. (See p. 16, *supra*.) Even if the Commission were compelled to permit intervention, that intervention would still be allowed upon such terms as the Commission deemed proper, as there is no statutory definition of the scope of intervention in the Stabilization Act. In such a situation the intervenor has no right to enlarge the issues.

> "It has been a rather rigid rule that the range of activity of an intervener in the prosecution or defense of the interest he is permitted to assert is necessarily as extensive as, but no greater than, that

allowed the original parties to the suit, that the intervention does not enlarge the scope or vary the nature of the litigation, nor will the court permit the intervener to file a pleading which would have that effect." (Cyclopedia of Federal Procedure, 2nd. ed., 1943, Vol. 6, Sec. 2405.)

From the outset the Commission restricted the proceedings to the operation of the sliding scale arrangement. Its orders of March 20, 1942 and July 21, 1942 specified that the investigation and hearings should be in conformity or in accordance with the sliding scale arrangement (R. I, 33-34).

Congress has given the Commission the authority to make rules and regulations covering its practice and procedure (D. C. Code Section 43-202). Pursuant to this authority the Commission enacted its Rule 7.5 which is as follows:

> "RULE 7.5. *Effect on Issues.* The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

This rule was in effect at the time of the petitioners' interventions and must be regarded as binding on them unless the rule was superseded or abrogated by the Stabilization Act of October 2, 1942. This, as we have shown, was not the case. The Commission rules also provide for a limited intervention. Rule 7.3 states:

> "The Commission may grant or deny a petition for leave to intervene, or may grant the petition

upon such conditions and limitations as it may prescribe."

Pursuant to this rule, the Commission, by its Order No. 2404 (R. I, 60-63) properly granted intervention to petitioners for the purpose of receiving from them "additional evidence relating to the inflationary effect, if any, of the increase in rates * * *."

Thus under the law and the Commission's own orders and its rules regulating procedure and practice before it the intervenors were not authorized to expand the issues.

b. *The petitioners were afforded a fair and complete hearing.* It is reasonable to suppose that Congress intended "an intervention of the usual character". (Opinion of Justice Miller, below.) As we have shown, Congress, by the Stabilization Act of October 2, 1942, had in mind a permissive intervention and not an intervention as of right. When the petitioners, after intervention, sought to enlarge the issues and have the Commission investigate the rate-base, rate of return and retirement accruals, they were seeking to introduce in the hearings issues not theretofore raised and not contemplated by the Commission. They were thus seeking more than "an intervention of the usual character." Unless they were authorized to compel the Commission to examine these matters, by the Stabilization Act of October 2, 1942, they were not denied a fair and complete hearing. The Stabilization Act of October 2, 1942 did not confer any such right, as we have demonstrated in POINT I above. A refusal to undertake an investigation which the intervenors have no right to demand, is not a denial of a fair and complete hearing.

III

THE DUTY OF THE COMMISSION TO FIX JUST AND REASONABLE RATES

It should again be noted that the petitioners do not complain of the rates but only of the procedure in which they were made. In other words, it is primarily the *method* not the *rates* which are objected to.

a. *The duty of the Commission under its own statutes.* It is the duty of the Commission to fix just and reasonable rates (D. C. Code, Section 43-301). This duty is not affected by the fact that the sliding scale arrangement is in effect (D. C. Code, Section 43-317). The Commission and it alone has been entrusted by Congress with the responsibility of regulating utilities within the District of Columbia. Its judgment as to whether or not a rate increase is necessary must be respected.*

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*The making of rates is an extremely complicated matter requiring, as it does, a balancing of the interest of the investors and the consumers. Professor Bonbright says (Bonbright *Valuation of Property*, Volume II, p. 1089):

> "Even the most enthusiastic supporter of any one form of prudent investment or of replacement cost must recognize that the advantages do not all lie with his own choice. The intelligent defender of the prudent-investment rate base, for example, well knows that in some respects it is decidedly inferior to a replacement-cost rate base, and that in other respects it is inferior to a scheme of rate making which disregards entirely the test of a reasonable return on any rate base of any description. The choice depends on a balancing of the relative merits and demerits of the alternative schemes. This necessity of weighing the good against the evil is all the more obvious because of the conflict of interests between various classes of people who

This Court has consistently refused to substitute its judgment for that of a commission on such matters. *Board of Trade* v. *United States,* 314 U. S. 534, 548 (1942), is relevant:

> "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."

In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224 (1943), this Court refused to set aside regulations of the Federal Communications Commission concerning chain broadcasting. After quoting from the *Board of Trade* case, *supra,* the Court continued:

> "* * * Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise."

In the concurring opinion of Justices Black, Douglas and Murphy in *Federal Power Commission et al.* v. *Natural Gas Pipeline Co. et al.,* 315 U. S. 575, 608 (1942), it was said:

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are materially affected by public-utility rates. Not only is there a division of interests between investors and consumers, but there are perhaps even more important divisions between different classes of investors and between different classes of consumers. Merely to illustrate these divisions, one may note that the prudent-investment principle is conceded, even by some of its enemies, to be in the interest of bondholders and of preferred stockholders, although it is alleged to be detrimental to the interests of common stockholders."

> ". . . the problem of rate-making is for the administrative experts, not the courts, and that the *ex post facto* function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of orders of other administrative agencies."

b. *The duty of the Commission under the Stabilization Act of October 2, 1942.* Since the rates objected to by petitioners are established by the Commission, it is to be presumed that such rates are just and reasonable. See *Federal Power Commission* v. *Hope Natural Gas Co., supra.* This presumption of validity is conclusive unless, under the Stabilization Act, an approved increase in rates is not just and reasonable if it is not "necessary", or unless that Act nullifies the Commission's duty to fix just and reasonable rates. It is difficult to determine from the petitioners' brief what they contend in this regard (see Br. pp. 67 *et seq.* and 73 *et seq.*). Whatever their contention, neither interpretation of the Act can be sustained, as we show in Point I above. Petitioners contend that the Stabilization Act "imposed a duty on regulatory authorities" (Br. p. 75). If this be so, Congress has passed an act "which precludes the execution of state laws by state authority in a matter normally within state power". This Court has said that it would be reluctant to place such an interpretation on a statute. If Congress had meant to do this, "it would not have been at a loss for words to say so" (*Davies Warehouse Co.* v. *Bowles, supra*).

The truth is the petitioners would have the Stabilization Act construed to prevent any rate increase for utilities ex-

cept where circumstances are such that an increase in commodity prices would be permitted.* This is as much as admitted in petitioners' brief (p. 17) where they say "It is of no relevance that the President was not given the power to suspend the exemption of public utility rates * * *".

Under this view the rejection of the Norris amendment in conference was of no significance. The Norris amendment was designed to confer upon the President the right to veto rate increases. Petitioners say that the substitute proviso imposes the duty to veto rate increases upon regulatory agencies. Thus they say that the rejection of the Norris amendment merely shifted the duty from a Federal agency to a State agency, but the *duty* would be the same in either case.

Under the contention of the petitioners, the function of the Commission here and of the commissions in all States, to fix "just and reasonable" rates would be at an end. What matters the rate-base if rates can only be increased to prevent "hardship"? What does it matter whether the rate of return is 4% or 6%? How can it possibly matter whether a sinking fund for a depreciation reserve carries interest at 4% or 6%? These are problems which though

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*This state of mind of petitioners is exemplified by the statement (Br. p. 23) that the rejected Norris amendment was to prevent * * * "the difficulties which the Administrator had been experiencing as intervenor before the Public Utilities Commission of the District of Columbia in this very case". They then say (Br. p. 24): "It cannot be supposed that, in a measure originally designed to put an end to such difficulties, the Congress in actuality merely perpetuated them". The short and simple answer is that the "measure originally designed to put an end to such difficulties" was not enacted by Congress, but was stricken out of the bill as passed.

raised by the petitioners here, are wholly immaterial if a rate increase can only be granted to prevent hardship. The only material questions on whether a rate increase is necessary to prevent hardship are inquiries as to the expenses, the revenues and the amounts necessary for interest and dividends; questions which have no necessary connection with rate-base or rate of return.

c. *The Commission Found the Increase to Be Necessary for the War Effort.* As a matter of fact, all the discussion in petitioners' brief about the requirements imposed by the price control legislation upon regulatory authorities is wholly beside the point in the case at bar because the Commission *found* the rate increase to be "necessary". We can assume *arguendo* that the Stabilization Act of October 2, 1942 proscribes a rate increase unless such increase is "necessary". The petitioners introduced no evidence whatsoever on the questions of whether the rate increase was necessary to prevent "hardship" or for the effective prosecution of the war but the Commission found nonetheless that such was the case.

The Commission said (R. I, pp. 50-51) that:

> "There is still another and very important problem for consideration, namely the financial position of the Company and particularly its ability to secure capital economically for the purpose of expanding its plant to meet the growing demands for gas service. We must weigh the necessity for an increase in rates against the broad problem of adequate service. Low rates are desirable only when coupled with adequate service, and such service cannot be rendered by the Company if it is unable to secure funds to provide the necessary additional facilities. The Dis-

trict of Columbia has been characterized as the No. 1 defense area of the United States, and it is vital that the Company be in a position at all times to provide adequate service.

* * * * *

"After careful consideration of all factors having a bearing on this case, including the fact that the credit position of the Washington Gas Light Company depends in large measure upon the integrity of this Commission in administering the sliding scale arrangement, we are of the opinion that, after making the adjustments hereinbefore approved, the amount available for increase in rates under the sliding scale arrangement for the rate year beginning September 1, 1942 is $201,424.74" (R. I, 50-51).

Thus the Commission itself found that the increase was necessary. Not only so, but it assigned two vital reasons for its action, namely, the financial position of the Company and the problem of adequate service. Certainly the Commission was not bound to accept the petitioners' judgment as to whether the rate increase was or was not necessary. Nor will this Court substitute its judgment for the Commission's on this question. Here is the nub of the controversy: If the appropriate regulatory authority finds a rate increase necessary because of the financial position of the Company and the vital necessity for adequate service in a war area, can the Director, the Administrator or the Court decree otherwise?

IV

THE COMMISSION ACTED PROPERLY WITHIN ITS DISCRETION UNDER THE STATUTES OF CONGRESS AUTHORIZING IT TO REGULATE UTILITIES WITHIN THE DISTRICT OF COLUMBIA

The Commission's action is presumed to be valid. *Federal Power Commission et al* v. *Hope Natural Gas Co., supra.* The findings of fact by the Commission are conclusive unless "unreasonable, arbitrary or capricious" (D. C. Code, Section 43-706). Thus a presumption of validity is attached to the rates it prescribes and its findings are conclusive so that its action is unassailable unless it acted unreasonably, arbitrarily or capriciously. Let us examine the Commission's actions.

a. *Background of the Sliding Scale.* No clear conception of the problems which confronted the Commission can be had unless the historical background leading up to the establishment of the sliding scale arrangement is understood.

Under the law creating the Public Utilities Commission of the District of Columbia, the Commission is charged with the duty (D. C. Code, Section 43-305) of ascertaining with respect to each public utility within its jurisdiction the original cost of the property, and the reproduction or replacement cost of that property. The Commission is also charged (D. C. Code, Section 43-306) with the duty of valuing the property of each public utility at the fair value thereof at the time of valuation.

In pursuance of these duties, the Commission, under date of September 25, 1931, by its Orders No. 947 and No.

948, instituted a valuation proceeding for the purpose of determining the values of the properties of the Washington Gas Light Company and of its wholly owned subsidiary, The Georgetown Gaslight Company, which two companies in their operations covered the District of Columbia. The proceedings with respect to the two companies were concurrent, and for the purpose of this brief we treat the two companies as one, under the appellation "the Company".

Thereupon the staff of the Commission, and the engineers employed by the Company, commenced a detailed inventory and valuation of the property of the Company, both groups preparing appraisals of reproduction cost new and of original cost, and also of depreciation. After the inventory was well under way, it was agreed that the valuation date should be June 30, 1932. During the period of preparation of the inventory and appraisals, it was suggested by the Chairman of the Commission that controversial issues which might develop at the hearings could be considerably limited if the engineers and accountants representing the Company and the Commission, respectively, were to engage in conferences to ascertain on what matters of fact they were in agreement and on what matters, in disagreement. These conferences commenced early in March of 1933 and continued through the spring and summer of that year.

Public hearings were begun on April 30, 1933. The Company's case in chief was closed on January 29, 1934, and the Commission's case in chief was closed on June 23, 1934. Testimony was finally closed on June 26, 1934. The record of the case consisted of nearly 7,500 pages of written testimony and 148 exhibits, comprising over 8,000 pages, making the aggregate record well over 15,000 pages. Elabo-

rate briefs were submitted by counsel for the Company and by People's counsel early in August, 1934.

Under date of March 19, 1935, the Commission handed down its valuation Orders Nos. 1341 and 1342, in which it determined the valuation of the properties of the Company. No separate allowance was made for going concern value, and the Commission reached the conclusion that the value of the property as of June 30, 1932 was $16,993,000 after deducting $3,037,000 for depreciation. The sum of $822,000 as the amount of working capital was included in the valuation. Thus the value of the properties of the Company, excluding working capital and after deducting depreciation, was determined to be approximately $16,170,000. (Tr. II, 238, 255).

On the subject of original cost, complete appraisals were submitted both by the Company experts and the experts of the Commission, and hundreds of pages of exhibits and testimony on this subject were included in the record. However, the Commission found (Order No. 1341, p. 81; Tr. II, 208):

> "* * * the actual original cost of the properties cannot be determined. Many of the early records are missing and in general, prior to 1915, in the case of structures and equipment, and prior to 1910, in case of the distribution system, the records which are available were not accurately kept."

It should be borne in mind that the Company had been in existence since July 8, 1848.

The Company filed appeals from the valuation orders under the provisions of paragraph 64 of the Law Creating the Public Utilities Commission (37 Stats. 974), which specifically provided that a public utility dissatisfied with

the valuation order might bring a suit to vacate or set aside the order in the Supreme Court of the District of Columbia. While this appeal was pending, and on August 27, 1935, Congress enacted a statute (49 Stats. 882) amending paragraph 64 to eliminate the right of appeal from valuation orders of the Commission; in 1936 after the sliding scale arrangement was established, these appeals were dismissed.

Shortly after the valuation orders were handed down, hearings for the fixing of rates were begun, which culminated in Order No. 1458 of the Commission dated December 13, 1935 (Tr. II, p. 256), and which prescribed the sliding scale arrangement for the fixing of rates of the Company. The rate proceedings were begun on June 3, 1935 and continued through October 31, 1935, when they were interrupted by the negotiations leading up to the sliding scale arrangement. At the time the rate proceedings were adjourned, the transcript of the oral testimony in that case consisted of more than 5,200 pages, and 113 exhibits had been received in evidence.

During the rate proceedings the valuation of the property was adjusted by adding net additions at cost up to June 30, 1935, and consideration was given to increased value due to change in price levels subsequent to June 30, 1932. The result was, according to the Company's computation and using the valuation figures determined by the Commission in its Orders Nos. 1341 and 1342, that the June 30, 1935 value of the properties of the Company was approximately $24,306,191 before depreciation. This figure, or a similar figure, was modified by excluding working capital and by deducting depreciation, and the agreed rate-base, fixed in the sliding scale arrangement, of $21,000,000, was the result. (See also *infra*, p. 43.)

b. *Misstatement of Fundamental Facts in Petitioners' Brief.* Great stress is laid in petitioners' brief on their unsupported assumption that the sliding scale rate-base was *an undepreciated rate-base* (petitioners' brief, footnote bottom of pp. 9 and 10; and pp. 3, 9, 16, 18, 37, 45, 80, 87 and 96).

Particular emphasis is made on page 9 of petitioners' brief, where they say:

> "On March 19, 1935, the Commission entered an order fixing $15,039,000 as the fair value of the *undepreciated property of the company as of June 30, 1935.*" (Italics supplied).

This statement is incorrect in three respects:

1. The figure used omitted The Georgetown Gaslight Company property. It should have been $16,993,000.
2. This amount of fair value was arrived at after deducting depreciation in the amount of $3,000,000.
3. The valuation date was June 30, 1932 (not June 30, 1935).

Only a very hasty reading of the Orders of March 19, 1935 would excuse the statement that the valuation made no provision for depreciation, as the detailed method of arriving at the valuation is fully set forth in the Orders. In Order No. 1341 (Tr. II, 124) relating to the Washington Gas Light Company alone, reproduction cost new of property other than land was found to be $15,550,000. From this was subtracted the finding of depreciation of $2,855,000 leaving $12,695,000. To this figure was added the value found for land, viz. $1,654,846, making a total of $14,349,846. To this was added $689,000 working capital, making a

total value, after deducting depreciation, of $15,038,846, which was rounded off by the Commission (p. 111, Order No. 1341) to $15,039,000. In Order No. 1342 (Tr. II, 239) relating to The Georgetown Gaslight Company alone, reproduction cost new of property other than land was found to be $1,845,000. From this was subtracted the finding of depreciation of $182,127, leaving $1,662,873. To this figure was added the value found for land, viz. $158,120, making a total of $1,820,993. To this was added $133,000 working capital, making a total value, after deducting depreciation, of $1,953,993, which was rounded off by the Commission (p. 16, Order No. 1342) to $1,954,000. This finding, when added to the finding for Washington Gas Light Company, results in a finding of value, after deducting depreciation, of $16,993,000 as of June 30, 1932.

Not only did the valuation orders of the Commission contain a deduction for depreciation, but the rate-base of $21,000,000 stipulated in the sliding scale arrangement (Tr. II, 260) was arrived at after the deduction of depreciation.

On November 18, 1935, the then Corporation Counsel and the Special Assistant Corporation Counsel for Public Utilities addressed a memorandum to the Public Utilities Commission regarding the proposed sliding scale arrangement. Paragraph numbered (1) of that memorandum reads in part as follows:

> "The rate base stated ($21,000,000. plus working capital) may be predicated upon the testimony of the Commission's own staff as such testimony appears in the record. The Commission's witness Scantlin's estimate of reproduction cost is $20,950,000. His deduction for depreciation is about $4,000,000. and the Companies' deduction is $1,000,000. If depreciation of (in round figures)

$3,000,000. as found by the Commission in the valuation case, be deducted, the figure becomes $17,950,000. To this must be added land at approximately $2,000,000., net additions and betterments between December 31, 1934, and June 30, 1935, of about $250,000., and the cost of the Prince George's Gas Corporation's property of $840,000. The total of these figures is $21,040,000."

c. *Problem Confronting the Commission.* Let us now consider the problem which confronted the Commission when, in the case now at bar, it embarked upon the annual determination of rates in August, 1942.

The proceeding at the start was a routine one and the order calling the hearing was the usual order. It provided (R. I, 34) that the Commission would hold a formal hearing on August 18, 1942 relative to the rates of the Company, to become effective September 1, 1942 "in accordance with the sliding scale arrangement established by Order No. 1458".

The sliding scale arrangement with the Company had been in effect since 1935. It had been arrived at at the end of a tedious and costly investigation which had been going on since 1931. It had been adopted after extensive public hearings and had been praised* as a means of avoiding the very type of proceeding which had just been concluded, and it was designed to keep the rates of the

*See the following articles in *Public Utilities Fortnightly*: April 27, 1933—p. 506, "How the Sliding Scale Basis of Rate-Making Works" by Mason M. Patrick; April 23, 1936—p. 531, "How Better Utility Regulation Can Be Achieved" by Riley E. Elgen; July 2, 1936—p. 11, "How the 'Sliding Scale' Reduced Rates" by William A. Roberts.

Company up to date in a fair and expeditious manner. While the Company's rates were regulated more closely and more frequently than by periodic rate proceedings under the orthodox method, the sliding scale arrangement was valuable both to the Company and to the Commission as providing a fixed and certain method of determining the charges to the consumer and, in effect, giving the consumer a closer and more timely interest in the welfare of the Company, in that in good times both the Company and the consumer benefited and in times of stress the Company and the consumer participated through the raising of rates.

All this the Commission knew. It also knew, through its supervision over the financing of the Company, that in prospectuses connected with the issuance by the Company of its bonds and preferred stock since the sliding scale arrangement had become effective, that arrangement had been described in detail to the investor, and that the investor must, to some extent at least, have relied upon the integrity of the sliding scale arrangement in purchasing these securities. The Commission was also aware of the skepticism in utility circles with respect to the sliding scale arrangement, commonly known as "the Washington plan", and of the cynical predictions that it would be allowed to work only so long as it provided an expeditious method of reducing rates, but would be scrapped the moment it indicated an increase in rates.* The Commission, or a majority of it, was aware of the background of the sliding scale. Also its counsel, the Corporation Counsel for the District of

*See the following articles in *Public Utilities Fortnightly:* March 30, 1933—p. 390, "A Regulatory Experiment" by Aaron Hardy Ulm; September 10, 1942—p. 373, "The Washington Plan Trembles in the Balance by Francis X. Welch.

Columbia, had participated actively in the valuation and rate proceedings leading up to the establishment of the sliding scale, first as People's Counsel and then as a member and vice-chairman of the Commission. As Corporation Counsel he also participated in the hearings in the fall of 1942.

The Commission realized that after weeks and months of hearings and investigation it had come to the conclusion in 1935 that the original cost of the property of the Company could not be found, but that the sliding scale had established a rate-base far less than that testified to by the experts of the Company; that to the extent that this rate-base might differ from original cost it constantly approached that cost as old properties were retired and new properties were added to the rate-base at their cost, and that the rate base had increased from the original amount of $21,000,000 to approximately $30,700,000 on June 30, 1942. It must be presumed that the Commission was thoroughly aware of its duties to fix just and reasonable rates under the statute, and every evidence was given of the consciousness of this duty throughout the hearings and in the opinion and order of the Commission.

The national policy to hold down the cost of living was brought forcibly to its attention by the Office of Price Administration at the pre-hearing conference before the hearings began. With this background in mind, let us examine what the Commission did.

d. *Proceedings of the Commission.* Its first step was to permit the Administrator to intervene in the proceedings and from then on until the close of the hearings, on Sep-

tember 30, 1942, it steadfastly refused to permit counsel for the Office of Price Administration to take control of the proceedings by enlarging the scope thereof.

Perhaps the best statement of the position of the Commission throughout these proceedings is contained in the statement of Chairman Flanagan (R. I, 122, 123), which we quote in part as follows:

> "This Commission in effect has already ruled that questions pertaining to basic elements of the sliding scale arrangement described in Order No. 1458, dated December 13, 1935, are not within the scope of the present proceeding. This proceeding is vastly different from a proceeding involving a rate case as that term is generally understood. Rate cases usually involve a tremendous amount of investigatory work, detailed analyses, and a complete review of the operations of the utility involved, sometimes over a period of years. The question of the detailed valuation of property also must be determined in such a rate case. Here all that work was done before the existing sliding scale arrangement was entered into. In every year in which the arrangement has been in effect the staff of this Commission has spent months in making detailed audit of the company's operations. To question a basic element of the arrangement at this time would undoubtedly result in throwing open all other elements of the arrangement for reconsideration. This would obviously lead to protracted negotiations, and the question as to whether another arrangement would be more advantageous or less advantageous to the consumer could not be settled within a period of months. It was not the intention of the Commission to initiate such proceedings when it called these hearings for the purpose of conducting its usual

annual investigation of rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company under the sliding scale arrangement.

"This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as to the relation of those aims and purposes to the present proceeding. However, we do not feel that the presentation of such views requires that the Office of Price Administration should carry on a detailed investigation into the accounts of the gas company. This has already been done by our staff, which is competent and experienced. It is the duty of this Commission to determine whether the accounting of the company has been performed in accordance with the terms of the sliding scale arrangement. We have the further duty of determining that items entering into the computations made under that arrangement are reasonable."

The position of the Counsel for the Office of Price Administration is made clear from the quotation from his statement (R. I, 206, 207):

"The position we must insist upon is that if we as the agent designated by the Director of Economic Stabilization are to comply with the obligations imposed upon us in utility rate proceedings, there must be no strings or restrictions attached to our ability to make an adequate showing that the rates of the Washington Gas Light Company should be no higher than charged by the Company to its customers on September 15. We must be given the right to examine every issue which the courts have

held enters into the making of fair and reasonable rate regardless of the terms of sliding-scale arrangement or previous conclusions by the Commission that a rate increase is justified. If we are to comply with applicable judicial principles affecting the question of fair and reasonable rates, we must have the right to go into at least the following factors:

> "(1) What is a proper rate base? And on that point an inquiry should be made and promptly as to why the rate base should not be predicated upon the original cost of the Company property. Why should the rate payers be compelled to pay increased rates upon a rate base largely in excess of the original cost of the Company's property?
>
> "(2) What are fair operating expenses of the company? Here the question of depreciation expense is a serious problem as far as the public is concerned since accrued depreciation was not deducted from the rate base.
>
> "(3) What are other proper operating expenses? Here the minority opinion by Commissioner Hankin must be given fair and adequate consideration.
>
> "(4) What are proper income taxes to be allowed or should the Company's customers pay its war taxes?.
>
> "(5) What is a fair rate of return for this Company in the light of current economic conditions?"

We doubt whether any clearer statement as to the issues between these two administrative bodies can be made. The

Commission was apprehensive lest the sliding scale be destroyed and the consumers of gas suffer by a return to the tedious and costly delays of orthodox rate making. Such a method, as we have shown, is costly to consumers both in the delays incident to rate decreases and the expense of regulation which, as the Court knows, is properly charged to operating expenses. While the return to orthodox rate-making might have been of temporary benefit to the consumers by indefinitely delaying an increase in rates, it would in the final analysis have been more costly to them and would have effectively scrapped the method which had been designed to avoid these delays and cost. (See the opinion of Mr. Justice Black in *McCart et al.* v. *Indianapolis Water Co., supra,* p. 26.)

The Commission fully realized that the sliding scale arrangement depended upon an agreement or determination with respect to three elements—rate-base, depreciation, and rate of return—and that, like a three-legged stool, no one of these elements could be considered or dealt with without considering and dealing with the others.

e. *Decision of the Commission.* With its background of knowledge and experience, and confronted with this perplexing problem, what was the decision of the Commission?

1. The Commission stated that it was its duty to determine in accordance with the provisions of the sliding scale arrangement whether the Company was entitled to an increase in rates and the amount of such increase, and the Commission stated:

> "This responsibility is so clearcut that to ignore it would constitute an evasion of our duty and would

be a serious reflection upon the ability of this Commission to cope with its problems in a fair and impartial manner." (R. I, 40)

2. The Commission stated that having made this determination it was its duty to give recognition to existing conditions and the bearing of such conditions upon the question before it, and that in addition to giving consideration to present economic conditions, it must consider the credit position of the Company and its ability to finance its requirements for plant expansion and to render adequate service to the consumers in the District of Columbia.

3. All controversial disallowances and adjustments of operating expenses proposed by the Commission's staff and with respect to which testimony had been adduced at the hearing were resolved in favor of the Commission's staff and against the Company, including the adjustment called for by Section 6 of the sliding scale arrangement, the justification of which required a considerable straining of the language of that part of the sliding scale arrangement.

4. In addition, the Commission declined to permit the inclusion in operating expenses of certain taxes, although this had been the practice in the past under the express stipulation of the sliding scale arrangement, and thus it eliminated entirely excess profits taxes and reduced the deduction for Federal income tax from the prevailing rate of 40% to 31%.

5. It provided that if by any chance the increase in rates granted by the order should be subject to excess profits taxes, that increase should be refunded to the consumers. (Under this provision the entire increase in rates

which had been paid by the consumers during the year 1942 was refunded to them.)

6. It approved a rate increase of only $201,000, although its own experts had testified that a rate increase of more than $324,000 should have been allowed.

7. The Commission found that the increase in rates would not have "material inflationary tendencies."

That was the decision of the Commission. It was unsatisfactory to the Administrator of the Office of Price Administration. It was certainly unsatisfactory to the Company.

The Commission's decision was designed to preserve the credit of the Company, sustain the adequacy of service to the public, and save the sliding scale arrangement for the consumers and for the Company. It is clear that the Commission considered all of these necessary and desirable in the interests of both consumers and investors. However, while the sliding scale arrangement was preserved, it was considerably bent in the process, and this was due to the Commission's serious consideration of the national interest and the necessity in that interest of keeping our wartime economy on an even keel and of preventing uncontrolled inflation. Every opportunity was taken to reduce the indicated rate increase, embarrassing as were the facts that the prices for labor and material paid by the Company had already skyrocketed, and that fair play and enlightened self-interest dictated close adherence to the sliding scale arrangement.

We submit that the problem involved was not an easy one. The result was certainly not perfect, and it was

unsatisfactory to many, but it was "the product of expert judgment which carries a presumption of validity". While the rate-making process involves "a balancing of the investor and the consumer interests", it here involved a balancing also of the national interest. (See dissenting opinion of Mr. Justice Jackson in *Federal Power Commission et al.* v. *Hope Natural Gas Co., supra.*)

The subsequent proceedings, in which the Director of Economic Stabilization was permitted to intervene and in which the Price Administrator participated, were an anticlimax. The Commission ordered (Order No. 2404) on October 23, 1942 (R. I, 62, 63) that the record in Formal Case No. 316 should be reopened for the purpose of receiving from the Office of Price Administration on behalf of the Director of Economic Stabilization "additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401 and intervention is granted for such purpose." The reopened proceedings were set for public hearing on November 2, 1942 and were taken up largely in an argument by counsel for the Director of Economic Stabilization and for the Price Administrator that the scope of the hearings should be enlarged. No testimony was adduced at this hearing, and the hearing was adjourned until November 4th, on which day further argument was made and discussion had on the record with respect to the enlargement of the scope of the proceedings, and a witness was presented by counsel for the Price Administrator who testified that the amount used by the Company for Federal income taxes in its determination for the amount available for the increase in rates was overstated by approximately $18,000. This was the only evidence offered. The case was closed, and on November 9, 1942

the Commission issued its Order No. 2418 denying the petition to vacate Order No. 2401.

CONCLUSION

As we have said before, this is essentially a controversy between two administrative bodies. The issue is not primarily the amount of the rates, but the *method* by which they were fixed. The Commission was faced with a choice of exercising its discretionary power over rate-making and following the laws applicable thereto, or of accepting the petitioners' judgment as to what it should do. It chose the former. Its action in this regard must be respected by this Court.

The order of the Court below and of the Commission should be affirmed.

Respectfully submitted.

STODDARD M. STEVENS, JR.
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February 1944.

APPENDIX

Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765:

> That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

> The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency

Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7: * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

The Emergency Price Control Act of 1942, 56 Stat. 23; Sec. 1 (a) (50) U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing ade-

quate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

District of Columbia Code (1940 ed.)

Section 43-301:

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 977, ch. 150, § 8, par. 2).

Section 43-305:

The commission shall ascertain, as soon and as nearly as practicable, the amount of money expended in the construction and equipment of every public.

utility, including the amount of money expended to procure any right of way; also the amount of money it would require to secure the right of way, reconstruct any roadbed, track, depots, cars, conduits, subways, poles, wires, switchboards, exchanges, offices, works, storage plants, power plants, machinery, and any other property or instrument not included in the foregoing enumeration used in or useful to the business of such public utility, and to replace all the physical properties belonging to the public utility. It shall ascertain the outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively, thereof, the date when issued, to whom issued, to whom sold, the price paid in cash, property, or labor therefor, what disposition was made of the proceeds, by whom the indebtedness is held, so far as ascertainable, the amount purporting to be due thereon, the floating indebtedness of the public utility, the credits due the public utility, other property on hand belonging to it, the judicial or other sales of said public utility, its property or franchises, and the amounts purporting to have been paid, and in what manner paid therefor, and the taxes paid thereon. The commission shall also ascertain in detail the gross and net income of the public utility from all sources, the amounts paid for salaries to officers and the wages paid to its employees, and the maximum hours of continuous service required of each class. Whenever the information required by this section is obtained it shall be printed in the annual report of the commission. In making such investigation the commission may avail itself of any information in possession of any department of the government of the United States or of the commissioners of the District of Columbia (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 6).

Section 43-306:

The commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation (Mar. 4, 1913, 37 Stat. 978, ch. 150, § 8, par. 7).

Section 43-317:

Nothing in chapters 1-10 of this title shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of chapters 1-10 of this title. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, determine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement (Mar. 4, 1913, 37 Stat. 980, ch. 150, § 8, par. 18).

Section 43-402. (See also Section 43-202).

The Commission shall have power to adopt reasonable and proper rules and regulations relative

to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it (Mar. 4, 1913, 37 Stat. 982, ch. 150, § 8, par. 32).

Section 43-706:

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, § 2).

Section 43-911:

Whenever, after hearing and investigation as provided in chapters 1-10 of this title, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in chapters 1-10 of this title (Mar. 4, 1913, 37 Stat. 992, ch. 150, § 8, par. 88).

Section 43-1002:

The Commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and

it shall be its duty, to enforce the provisions of chapters 1-10 of this title as well as all other laws relating to public utilities (Mar. 4, 1913, 37 Stat. 993, ch. 150, § 8, par. 90).

Section 43-201:

The Public Utilities Commission of the District of Columbia shall be composed of three commissioners as follows: (1) The Engineer Commissioner of the District of Columbia, and (2) two persons appointed by the President, by and with the advice and consent of the Senate * * * (Dec. 15, 1926, 44 Stat. 920, ch. 8, § 1).

SENATE DEBATE

(88 Cong. Rec. 7973-7974.)

"Mr. Norris. Mr. President, I wish to refer to the action of the conference committee in including in the conference bill the language which the Senator from Michigan read and which takes the place of the amendment offered by me when the measure was before the Senate for consideration. It relates to utility rates and charges.

"What has been substituted by the Conference Committee for the original language agreed to by the Senate does not, technically, afford any relief whatever, although, morally, I think it will result in considerable relief.

"I intend to vote for the conference report, but I wish to call attention to the legal effect, as I understand it, of the language which has been substituted.

"The committee has provided that no utility rate shall be increased unless 30 days' notice shall be given the President by the corporation seeking the increase. There is also the requirement that in the notice it shall be agreed that the President may have the right, through any instrumentality he may select, to appear before the body having jurisdiction of the rate. I think I have stated the legal effect correctly.

"Mr. Brown. The Senator has stated it correctly.

"Mr. Norris. That does not give the President any right to pass on the question. It does not give him any right to appeal in case the Board's decision is against his representative's ideas.

"Mr. Brown. I would not be sure, if the Senator will pardon me, that his last statement is in accord with my own views. I think he would have the same right to appeal that any other interested party would have.

"Mr. Norris. I did not look at it that way. If he would have that right, it would add a great deal to the legal effect of the language which has been placed in the measure.

"Mr. Brown. He becomes a party to the proceedings, that is, his agent does.

"Mr. Norris. Yes, he does. The Senator's idea is that if under the law and the rules and regulations of the body having jurisdiction to hear the complaint, or the request, as it would be, an appeal is provided for, the President could avail himself of that right of appeal.

"Mr. Brown. Yes.

"Mr. Norris. I hope that will be the construction placed upon the language.

"Mr. Bone. Mr. President, will the Senator yield?

"Mr. Brown. I yield.

"Mr. Bone. I am assuming in asking the question that even though the President's representative would be technically a party in an appeal, he would merely have the right formally to present his views, or the views of the administration, to the regulatory body, but he would have nothing to say about its decision. If its decision were that the increase in rates should be granted, the decision would be final.

"Mr. Norris. If the Senator from Michigan has the correct idea, the President or his representative would have the right to appeal, as any party to the dispute would have the right to appeal.

"Mr. Brown. But with absolutely no authority to participate in the decision.

"Mr. Norris. No; with no authority to participate in the decision.

"Mr. Bone. That is what I meant by my question.

"Mr. Norris. As I said, I think that would have a great moral effect. The only thing the President's representative could plead for or urge when he appeared at the hearing would be that if the body then hearing the dispute should increase the rate, it would very likely interfere with all that the Price Administrator had done in the fixing of prices, because no one will dispute the utility rates enter directly into the cost of living. If gas rates, or electric rates, or water rates, or freight rates, or streetcar rates are increased, every single item of increase goes directly into the cost of living and hence interferes with any attempt to prevent inflation. After all, that is why I am deeply interested in this proposition; I want to prevent inflation, if possible. That is the object of our giving someone the authority to fix prices and freeze them at a certain level. If any persons or corporations have the power to increase any item of the cost of living, and it is done contrary to the order of the President or the Price Administrator, it will tend directly to overthrow the prices so fixed and will throw the whole structure out of gear, thus tending to increase the cost of living, and making it necessary to increase all other prices which enter into the cost of living, with the result that, as I believe, inflation will follow immediately.

"There would be a moral effect, however. When the President's representative appears before a tribunal having jurisdiction to fix or increase utility rates, he could say —and that is about all he could do—that if the requested increase were granted, it would tend to increase the cost of living, and hence throw out of gear the entire machinery designed to prevent inflation. If the tribunal increased utility rates during the war, notwithstanding the kind of showing made by the President's representative, it would

in my judgment have a great effect upon public sentiment. The tribunal, board, or commission which acted to increase rates, in the face of a showing that such action might lead to the worst kind of inflation, would find itself in a position which no board would want to be in. I think the provision in question will have a great moral effect. Therefore, I myself feel disposed to accept this language and vote for the conference report.

"Mr. President, I think I realize as fully as does any other Senator the earnestness, the fidelity, and the good faith with which the conferees on the part of the Senate have labored. We are all anxious to get through with this measure, and I think we should all be willing to sacrifice something we believe ought to be in the measure in order to have it finally passed. For that reason I do not believe we are justified in rejecting the conference report simply because in some particular it has not met completely with our ideas.

"I wanted to say this much, and by saying it in the Senator's time it is unnecessary for me to make a speech on the subject in my own time.

"Mr. Brown. I thank the Senator from Nebraska, and I want to say to him that I shall do what I can to expedite the hearing upon his bill which deals with the matter he has discussed.

"Mr. Norris. I am of the opinion that it would be rather useless to crowd that bill if the language now contained in the conference report becomes the law."

FILE COPY

Court, U.
FEB 8
CHARLES ELMORE CROPLE
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 396

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT, PUBLIC UTILITIES COMMISSION

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DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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OCTOBER TERM, 1943
No. 396

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BRIEF FOR THE RESPONDENT, PUBLIC UTILITIES COMMISSION

COUNTER STATEMENT

The Public Utilities Commission of the District of Columbia (the "Commission"), acting pursuant to authority contained in Paragraph 18 of the Act creating it (37 Stat. 986, Title 43-317, D.C. Code 1940; R. I, 246), promulgated Order No. 1458 (R. I, 252; Exhibit "C", Tr. 258), providing a sliding scale arrangement for the annual determination of rates for gas service in the District of Columbia. The plan was promulgated after investigations, valuation proceedings and public hearings extending over a period of 3½ years and costing approximately $750,000 (R. II, 443). The Commission found that the plan was practicable and would be advantageous to all interested parties (Page 3 of Exhibit "C").

The plan provides methods for the annual investigation and determination of the rate base, the amount available for return, the rate of return earned during the "test year" and the amount available for rate increase or decrease for the new "rate year", and rate schedules, rules and regulations accomplishing such increase or decrease in rates (R. I, 39; Exhibit "C", Tr. 258). The plan provides the determination shall be made "after public notice and opportunity for hearing".

The "rate year" is defined to mean "the twelve months' period from September 1st to August 31st, inclusive, for which rates are being determined". The "test year" is defined as "the twelve months' period ending at the close of business on the Adjustment Date". The "Adjustment Date" shall be "June 30th preceding the Rate year" (Exhibit "C", Tr. 258).

The "test year" involved in the proceeding before the Commission was the twelve months' period ended June 30, 1942 (R. I, 253; Schedule 2, Exhibit 1). The "rate year" involved was the twelve months' period beginning September 1, 1942 (R. I, 34).

The basic elements of the sliding scale plan consist of (1)

the method of establishing the rate base for each year; (2) the method and rates of computing annual accruals for retirement reserve, (3) the primary rate of return, and (4) the method of determining the amount available each year for rate increase or decrease. There have been reductions in rates in each year since the plan was adopted in 1935, except the years 1937 and 1941, when no changes were made (R. II, 428, 439).[1] Coincident with the adoption of the plan, rates were reduced more than $800,000 in 1935 (R. II, 415, 357). Smaller reductions were made in the other years all of which have continued in effect since they were made (R. II, 357, 415). The order of October 13, 1942, increased rates for the first time under the plan (R. II, 357).

The Commission, on March 20, 1942, issued its statutory order of investigation into the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Company, in conformity with the sliding scale arrangement (R. I, 33). On July 21, 1942, pursuant to statutory requirement, the Commission issued notice of hearing relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Company, to become effective September 1, 1942, "in accordance with the sliding scale arrangement established by Order No. 1458" (R. I, 34).

Both Petitioners were interveners in the proceeding before the Commission. The Price Administrator was represented at the prehearing conference held by the Commission on August 14, 1942, (R. I, 61, 84; R. II, 429) and throughout all subsequent hearings (R. I, 40, 253; R. II, 429). The Price Administrator was permitted to intervene without objection on the opening date of the hearings on August 18, 1942 (R. I, 72, 73). The hearings began on August 18 and continued on August 19 and on September 4, 8, 11 and 14, 1942. They were closed for the first time on the latter date (R. I, 181). The parties,

[1] In Order No. 2682, promulgated November 8, 1943, under the provisions of the plan, the rates were again reduced for the "rate year" beginning September 1, 1943, in the amount of $135,417.

including the Price Administrator, filed briefs on September 25, 1942 (R. I, 62).

At the hearing on August 19, counsel for the Price Administrator requested a continuance of the proceedings to give him time "to determine the extent of the testimony we would want to present, and also the extent of the cross-examination I may want to conduct of the witnesses who have presented their testimony," (R. I, 102). He wanted "an opportunity to have such testimony prepared" (R. I, 104). He asked for a reasonable opportunity "to determine just how far we want to go" (R. I, 106, 107). The request for a continuance was granted (R. I, 61, 110), and the hearing was reconvened on September 4 (R. I, 111). Counsel for the Petitioners cross-examined all witnesses who had testified in the earlier proceedings and presented testimony of three witnesses (R. I, 151-158, 158-169, 169-174; Tr. 797-857), and offered several exhibits all of which were received in evidence (R. II, 413, 420-422). He offered no other testimony.

Upon the petition of others to intervene, the Commission reopened the proceedings and set further hearings for September 30, 1942 (R. I, 62, 181), in which counsel for the Petitioners participated and filed a second brief (R. I, 62, 181). The Record was closed for the second time on September 30, 1942, which was prior to the enactment of the Act of October 2, amending the Emergency Price Control Act of 1942.

Counsel for the Petitioners was afforded every opportunity to present testimony within the scope of the order of investigation and notice of hearing. In addition, at the hearing on September 8, 1942 (Tr. 476), the Chairman of the Commission stated to counsel for the Petitioners:

> "This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as

to the relation of those aims and purposes to the present proceeding." (R. I, 123; R. II, 416.)

The Chairman stated that the Commission would be faced with the question, whether in view of the national emergency, the rates and charges for gas services should be increased and that—

> "It is expected that the Office of Price Administration, as intervener in these proceedings, will develop its testimony along lines which will assist us in arriving at a determination of this question at an early date." (R. I, 123.)

Other requests were made by the Chairman that counsel for the Petitioners give the Commission the benefit of the views and policies of the Office of Price Administration, relating to the questions before the Commission (R. I, 126, 133, 138, 139-140, 143; R. II, 416, 417, 443).

After the proceedings had been closed for the second time on September 30, 1942, the Commission took under consideration the record and briefs, and on October 13, 1942, issued its findings and opinion, and Order No. 2401 (R. I, 39-57).

The Emergency Price Control Act of 1942 (56 Stat. 23) was amended on October 2, 1942 (56 Stat. 765).

Section 302 (c) of the Emergency Price Control Act (56 Stat. 36) contains the following provision:

> "*Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *."

Section 1 of the amendment of October 2 (56 Stat. 765) provides that no common carrier or other public utility "shall

make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency".

Section 2 of that amendment provides that the President may suspend Clause (1) of Section 302 (c) of the Emergency Price Control Act "but he may not under the authority of this Act suspend any other law or part thereof." The President was not given authority to suspend Clause (2) of Section 302 (c) which denied to the Price Administrator the regulation of common carrier or other public utility rates. Clause (2) of Section 302 (c) was not modified or repealed by the amendment of October 2.

Under the terms of the sliding scale arrangement, the "rate year" begins September 1, but in view of the Act of October 2, the Commission directed the Company's attention to the requirement of Section 1 thereof. After referring to the provisions of the sliding scale plan relating to the beginning of the "rate year", the Commission said:

> "However, the Commission directs the attention of the Company to the provision contained in the Act, approved October 2, 1942, entitled * * *." (R. I, 56.)

Following this direction, the Commission then quoted the specific language in Section 1 (R. I, 56).

Pursuant to the direction contained in the order and the provisions of Section 1 of the Act of October 2, the Company, on October 15, 1942, served notice upon the Director of Economic Stabilization (the "Director") of the proposed increase in rates and also served upon him a copy of the Commission's order of October 13, as well as a copy of Order No. 1458 which established the sliding scale arrangement (R. I, 3, 7, 11, 187-190; R. II, 429). The Company later consented to the intervention by the Director (R. I, 3, 8, 191; R. II, 430). The Director alleged in his petition of appeal to the District Court that

he was given the thirty days' notice on October 15, and that consent to intervene was given by the Company (R. I, 3). The Court of Appeals found that the thirty days' notice and consent to intervene, required by the Act of October 2, were duly given (R. II, 429, 430, 431) and that the provisions of that Act "were complied with" (R. II, 431). The District Court made no finding in respect of compliance with the Act of October 2 (R. I, 15-20).

Following the enactment of the amendment of October 2 and the notice to the Director pursuant to the provisions of that Act, the same counsel who had participated in all prior proceedings for the Price Administrator, filed with the Commission on October 19, 1942, in the name of the Price Administrator, a petition on behalf of the Director asking (1) that the Commission vacate the order of October 13; (2) that the proceeding be reopened; (3) that the Director be allowed to intervene in the proceedings, and stated that the issuance of the order without permitting him to intervene denied him—

> "his right to appear in this proceeding for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities." (R. I, 59,66.)

Pursuant to the petition on behalf of the Director, the Commission on October 23, 1942, reopened the proceedings for the second time (R. I, 60-63) and granted the Director the right to intervene and set the matter for further hearing on November 2—

> "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Econom-

ic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose." (R. I, 62-63.)

When the reopened proceedings came on for further hearing on November 2, the same counsel who had participated in all previous proceedings and filed two briefs for the Price Administrator, again appeared as counsel for the Petitioners. He did not call any witnesses in the reopened proceedings on November 2, but again renewed a motion which had previously been filed with the Commission that the proceedings be reopened "without restriction as to the type of evidence to be presented", and that the Commission vacate its order of October 13 (R. I, 200). In support of the motion to vacate the order of October 13, he said "the basic issue here is the question of the revocation of the Commission's order" (R. I, 220).

The Commission denied the motion and the Chairman announced that the Commission was ready to receive evidence in accordance with the order reopening the proceedings on behalf of the Director. Counsel for the Petitioners did not call a single witness on November 2 (R. I, 183-220). The Chairman of the Commission again asked counsel whether he had any testimony to present along the lines laid down in the Commission's order reopening the proceedings on behalf of the Director. He then asked for a continuance until November 4 for the purpose of permitting him to consult with his associates about further proceedings (R. I, 215, 217, 218, 220), which request was granted (R. I, 220).

When the hearing reconvened on November 4, counsel for the Petitioners recalled to the witness stand an official of the Company for the purpose of showing that his computation of the accrual for Federal income taxes would be changed by reason of the enactment of the Revenue Act of 1942, which fact did not affect the Commission's determination of net income

(R. I, 221-226). The Company's computation was disregarded entirely because the Commission predicated its allowance for Federal income taxes at 31% pursuant to the provisions of the Revenue Act of 1941, instead of the rate of 40% contained in the Revenue Act of 1942, as set forth in its Order No. 2401. At the conclusion thereof counsel for the Petitioners stated:

> "We think the record is clear now that the Commission's order is inflationary in character." (R. I, 226.)

He offered no other evidence (R. I, 67, 220-229).

The proceedings were closed for the third time on November 4, 1942 (R. I, 229), without any testimony relating to "the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities." (R. I, 183-229; Tr. 969-1149).

The Commission reconsidered the record and the testimony offered on behalf of the Director, and on November 9 issued Order No. 2418 (R. I, 66-67), in which it reviewed the proceedings and the testimony, and found that:

> "The evidence adduced fails to show that the rates authorized by Order No. 2401 are inflationary",

and accordingly denied the petition on behalf of the Director to vacate Order No. 2401, promulgated on October 13 (R. I, 67).

On November 16, thirty days after the Company had given notice to the Director of the proposed increase in rates, the Company put the new rates into effect as of that date (R. I, 14; R. II, 363, 429, 430, 431).

Notwithstanding the statutory order of investigation and

notice of hearing calling for the annual proceedings under the provisions of the sliding scale plan, the Price Administrator, as intervener, sought to change the scope of the investigation and the hearing by enlarging it into a reconsideration and revision of the sliding scale plan itself, rather than a determination under the terms of the plan (R. I, 38; R. II, 440, 441). The order instituting the investigation and the notice of the hearings did not call for a reconsideration and revision of the provisions of the plan.

That it was the intent and desire of the Petitioners to depart from the notice of investigation and hearing is best illustrated by the following. They sought to have the Commission review the plan "for revision of the provisions of the 'sliding scale arrangement' " (R. I, 38); that the Commission "review the basic phases of the sliding scale arrangement" (R. II, 374); reopen the proceedings again "without restriction as to the type of evidence to be presented or otherwise limiting the scope of further hearings to be held in this matter" (R. I, 65, 200); and "to throw the case wide open" (R. II, 400). They also requested the "proceeding be broadened" (R. I, 167) "without restriction as to the type of evidence to be presented" (R. I, 200) and with "no strings or restrictions attached" (R. I, 206). Counsel for Petitioners further insisted that "we must have the right to go into at least the following factor", and then enumerated the various factors which constitute the basic elements of the sliding scale plan, namely, (1) the method of determining the rate base and why it should not be changed, (2) the method of computing annual accruals for retirement reserve, (3) what are proper operating expenses, (4) what are proper income taxes to be allowed, and (5) the question of the rate of return (R. I, 207; R. II, 440, 441).

The Petitioners made no offer of proof in connection with any of the basic elements of the plan (R. II, 441).

The Commission refused to depart from the investigation

instituted by the order of March 20 and the notice of hearing of July 21.

The Chairman of the Commission announced on September 14, 1942, that when the Commission decides to open an investigation on the sliding scale arrangement "it will give appropriate notice and conduct that investigation as a separate problem" (page 772, proceeding before Commission). Reconsideration was given to provisions of the plan in Formal Case 334, after order of investigation and notice, and the primary rate of return was reduced (Order No. 2682).

The Act creating the Commission provides it shall have power to adopt reasonable and proper rules and regulations relative to investigations made by it "and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it" (R. I, 248). The Commission's Rules of Practice and Procedure provide it may grant or deny a petition for leave to intervene or may grant it "upon such conditions and limitations as it may prescribe". The rules provide that granting such a petition "shall not have the effect of changing or enlarging the issues in the proceeding", except when such change or enlargement "is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties" (R. I, 251, 252). The petitions to intervene did not expressly request a change or enlargement of the issues (R. I, 34-37, 57-60), nor did the Commission change or enlarge them.

The statute requires the Commission to advise the utility of matters under investigation that require formal hearings and give notice of the time, place and the matters to be heard. No order affecting fair value or rates may be issued by the Commission without a formal hearing (R. I, 247-248).[2]

[2] Paragraph 7 of the statute (37 Stat. 978, Title 43-306, D. C. Code) provides "That the Commission shall value the property of every public utility * * * at the fair value thereof at the time of said valuation." Paragraph 8 provides that before holding a public hearing in a valuation proceeding, the Commission must give the utility "notice of not less than thirty days".

Under the order of investigation, the accounting staff made a complete and detailed audit of the Company's books and records which comprised a total of 2,110 man hours (R. I, 88). The Commission's Chief Accountant and Chief Engineer presented detailed testimony relating to all of the basic facts involved in the application of the sliding scale arrangement, including the determination of the rate base, accruals for retirement reserve, the rate of return earned and the net amount available for rate adjustment and an allocation of the property in the District of Columbia and outside the District. The Chief Accountant prepared and introduced Exhibit No. 1, consisting of six schedules which set out in detail the basic findings and supporting data. Schedule 1 shows the summaries of the adjusted operating revenues, adjusted operating expenses, net amount available for return prior to adjustment, the adjustments, the rate of return earned and the net amount available for rate adjustment. That schedule and the testimony supporting it show that after disregarding all excess profits taxes as operating expenses the Company earned during the test year 5.1059%. The allowance of all excess profits taxes as an operating revenue deduction (Exhibit No. 1, Schedule 5, Page 4) would reduce the earned rate of return to 4.95%. This computation was made prior to the enactment of the 1942 Revenue Act, and does not give effect to a slight saving by reason of the credit allowed for preferred stock dividends in the computation of surtax net income.[3]

The rate base unweighted at June 30, 1942, prior to any allocation for service rendered outside the District of Columbia and before including working capital, was $30,701,806.87. (Ex. 1). This amount was arrived at after deduction of $1,737,571.78 for contributions in aid of construction and deposits for extensions of mains. Thus the unweighted rate base at June 30th is predicated on $32,439,378.65 for gas plant in

[3] The rate of return of 4.87% found by the Court of Appeals (R. II, 428) was based upon the Company's computation of rate base and income as reflected on Exhibit No. 2.

service. This latter amount contains $1,055,549.52 representing the difference between the appraised value of land and the original cost of land. The rate base therefore, insofar as gas plant in service is concerned, is 96.75% original cost as best it can be determined.

Schedule 2 shows the determination of the rate base on a weighted and an unweighted basis. Schedule 3 shows the adjusted operating revenues of the Company during the test year, and Schedule 4 shows the adjusted operating expenses. Schedule 5, consisting of four pages, shows in detail the accounting adjustments in operating revenues and operating expenses which were reflected on Schedules 3 and 4. Schedule 6 is a comparative statement of unadjusted net operating income for the test years ended June 30, 1942, and June 30, 1941, and shows the MCF [4] operating revenues and operating expenses, as well as increase or decrease in MCF in both operating expenses and operating revenues (Tr. 101).

The Petitioners accepted the audit of the Company's operating accounts made by the Commission's staff (R. II, 400), and did not question any of their calculations (R. II, 392).

Exhibit No. 2 shows a comparison between the computations made by the Company and the Commission's staff in the determination of the net amount available for return. This exhibit also contains a statement of the reasons for the difference in the computations. Exhibit No. 3 is made up of the records of the proceedings before the Commission in two finance proceedings relating to the Company, involving an increase in the capitalization of the Company by the issue of $4.25 preferred stock and issue and sale of $5 cumulative preferred stock. Exhibit No. 4 shows the allocation of the property in the rate base in the District of Columbia and outside the District. Exhibit No. 5 was presented by the Company to set forth various proposed rate schedules and the schedules to which adjustments should be carried and the general serv-

[4] One thousand cubic feet.

ice provisions and rules and conditions of service. The Commission's staff presented proposed rate schedules, carrying into effect the proposed adjustments which were adopted by the Commission (R. I. 53). Exhibit No. 9 was prepared by the Company upon request and presented by the Commission's counsel for the purpose of showing the effect of the proposed increased rates upon domestic consumers and the distribution of increases by various schedules. This exhibit also shows the effect of the proposed rate increase on commercial and industrial consumers and the distribution by schedules and the general effect of the rate increases on consumers. In addition to the foregoing exhibits and oral testimony supporting them, a stipulation, prepared by the conferees following the prehearing conference, was submitted setting forth the facts relating to issues as to which the conferees could not reach agreement.

The Petitioners offered no evidence in respect of the basic questions raised by the order of investigation and the notice of the hearing, except that one witness presented Exhibit No. 8, which was made up from computations made by the Commission's staff and the Company as shown on Exhibit No. 2, in which the witness substituted, at the request of counsel for the Petitioners, a sinking fund in lieu of retirement reserve, and computed income taxes at 19% (R. I, 160). The Petitioners offered no testimony in respect of the rate base, the rate of return earned, or the proper percentage for accruals for depreciation, or as to the propriety or the application of the method of determining the amount available for rate adjustments, as set forth in the sliding scale plan. They offered no testimony as to the fairness or reasonableness of the rates in effect prior to the investigation or the rates in the proposed schedules. They offered no testimony on what constituted a fair and reasonable rate of return or the effect thereon of the proposed rates.

Paragraph 63 of the Public Utilities Act (37 Stat. 988, Title 43-703 D. C. Code) makes the findings of the Commission in

respect of rates, tolls and charges prima facie reasonable (R. I, 246).

The accounts of the Company are kept pursuant to the Uniform System of Accounts for Gas Companies, prescribed by the Federal Power Commission, and adopted by the Commission. However, the computations of retirement accruals for rate-making purposes are made according to the provisions of the sliding scale plan.[5]

The Commission found that the operating expenses of the Company with the adjustments made by it and described in its findings were recorded in accordance with the Uniform System of Accounts, and that such expenses as so adjusted were fair and reasonable and proper in the determination of rates under the sliding scale plan. (R. I, 47-48). The Uniform System of Accounts states that the operating expenses accounts (701 to 809) "are designed to show in detail the cost (except depreciation, amortization and depletion, certain property losses, and taxes) of furnishing gas utility service" (R. I, 47).

The calculations made by the Commission's staff showed that, under the sliding scale, the Company was entitled to a rate increase of $324,718.06 after disregarding all excess profits taxes; the Company's computation indicated an increase of $381,597. The difference in the calculations was due to adjustments in operating expenses and taxes (R. I, 254; R. II, 435). In the light of existing conditions and to prevent any inflationary effect which such allowance would invite, the Commission disallowed as operating expenses all excess profits taxes and Federal income taxes greater than 31% of the Company's tax liability (R. I, 258, 261-262; R. II, 436, 438). After giving consideration to all factors (R. I, 254, 262, 265; R. II, 437, 438), including economic conditions due to the war (R. II, 435), the Commission reduced the computations under the sliding scale by $123,293.32 below that made by the Commission's

[5] The annual charges for retirements under the sliding scale plan are reduced by interest accruals on the retirement reserve balance compounded on a monthly basis.

staff (R. I, 266; R. II, 429) and found the Company was entitled to an increase in rates which would produce $201,424.74 (R. I, 265, 268; R. II, 429). The rate schedules put into effect increased rates by $200,141 [6] (R. I, 266). Petitioners did not question the calculations under the plan (R. II, 392).

Since there was no rate adjustment in 1941 the rates in effect during the test year involved (July 1, 1941, to June 30, 1942) were those established by Order No. 1921, effective as of September 1, 1940. Those rates were based upon the operating experience of the Company for the test year July 1, 1939, to June 30, 1940 (R. I, 40).

The total increase for all customers was 2.28% in excess of rates in the preceding rate year (R. I, 267; R. II, 438). Domestic consumers using 2500 cubic feet or less per month had no increase in their rates. The Commission found that the cost of gas constitutes only 1.17% of the average cost of living in Washington and that the increase in rates would increase the cost of living index by only about 1/37th of 1%. The Commission found that such increase would not have material inflationary tendencies (R. I, 267; R. II, 438).

To guard against the possibility of increase in rates that might result in the liability for excess profits taxes in the new rate year derived from the rate increase authorized, the Commission incorporated in its order a provision that if the increased rates should impose a liability for excess profits taxes, any such amount should be recorded in a specially provided deferred credit account and refunded to consumers [7] R. I, 49, 56-57).

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[6] See footnote (7) *infra*.

[7] Additional revenue resulting from the increased rates for the period November 16, 1942, when the new rates were put into effect, to December 31, 1942, in the amount of $38,858 were refunded by reason of the above mentioned provisions in the order. Accordingly, customers were billed at the new rates only for the period January 1 to August 31, 1943, the effective date of a new rate Order No. 2682, which reduced the rates for the rate year beginning September 1, 1943. The Company has computed the revenues in the eight months from January 1 to August 31, 1943, resulting from the increase in rates authorized in Order No. 2401 as $142,400.26. The net result, therefore, of the rate increase is $142,400.26 instead of $201,424.74, authorized by Order No. 2401. The rates authorized by Order No. 2682, effective September 1, 1943, based on sales for the test year July 1, 1942, to June 30, 1943, provides for a reduction of revenue of $132,896.

During the test year involved, labor costs included in the operating expenses of the Company were approximately $380,000 more than the prior test year or approximately 16% increase in wages[8] (R. I, 51, 109, 110). This wage increase was based upon the cost of living index (R. I, 109). The District of Columbia Gas Workers Union urged an increase in rates to enable the Company to pay its employees on a basis comparable to other utility employees (R. I, 108-110).

In its findings and opinion accompanying Order No. 2401, the Commission discussed the nature of the proceedings and in some detail discussed the various issues and the testimony relating to them and made its basic findings of fact and stated its conclusions thereon (R. I, 39-55). It promulgated its order carrying into effect the findings and conclusions reached (R. I, 55-57). The order sets out the various schedules containing the blocks of gas in cubic feet and the rate for each block for the various rate schedules in the rate structure, with the rules, regulations and conditions of service under which the Company is required to furnish gas service.

The Company took no appeal from the Commission's order. After giving thirty days' notice to the Director (R. I, 3, 7, 11, 187, 188), the new rates became effective as of November 16, 1942 (R. II, 363, 429, 430, 431). The Petitioners, who were interveners before the Commission, took an appeal from the Commission's order to the District Court.

The District Court found that the proceeding was instituted under the order of March 20, 1942, under the provisions of the sliding scale arrangement (R. I, 16), and that the Price Administrator requested the Commission "to reconsider the basic principle of the sliding scale arrangement in the light of the Government's program to prevent increases in the cost of living and to stabilize prices" (R. I, 17). The Dis-

[8] The wage increase experienced by the Company during the test year was more than $237,000 greater than the net rate increase after the refund referred to in footnote (7) was made. The publicly announced policy of the Price Administrator, as well as the national policy in fixing commodity prices, is to give effect to increase in wage rates and the cost of production. If the Commission had given effect to increased labor costs alone, it would have been justified in authorizing an increase in rates far in excess of the amount ordered by it.

trict Court found that the Petitioners complained because the Commission refused "to broaden the scope of its inquiry beyond the purpose indicated in the order of March 20, 1942" (R. I, 17, 18). The Court found that the action of the Commission was arbitrary and illegal because it "regarded" the inquiry "within the scope of the order of March 20" (R. I, 18), and vacated the Commission's order (R. I, 20). The District Court denied motions of the Commission and of the Company to dismiss the appeals from the Commission's order. Both the Commission and the Company appealed from that judgment.

The District Court made no findings or determinations as to the reasonableness of the rates prescribed in the order of October 13.

Paragraph 66 of the Act creating the Commission (49 Stat. 883) provides that in the determination of an appeal from an order of the Commission, the review of the Court "shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious". The District Court made no findings in respect of the facts.

The United States Court of Appeals for the District of Columbia (the "Court of Appeals") found that "the order of the Commission was issued only after a deliberate and careful study of the factors affecting the business of the utility in wartime Washington without a trace of hasty or arbitrary conduct on the Commission's part" (R. II, 438). It found that the Commission's findings were based on convincing evidence (R. II, 438), and that "findings, supported by substantial evidence, were made" (R. II, 435), after careful consideration of all factors having a bearing on the case (R. II, 437). The Court of Appeals stated that the important issue in the case turns upon the action of the Commission in confining the rate investigation to an application of the sliding scale to prevailing conditions and a consideration of the possible inflationary

effect of a price increase, and in refusing a demand of the Price Administrator that a thoroughgoing examination be made into the rate base, the rate of return, operation expenses and depreciation and all other matters relative to the establishment of a fair return (R. II, 431).

After discussing the requests of the Petitioners that the Commission institute a different kind of investigation, the Court of Appeals said:

> "In its essence, the question raised in this aspect of the case is whether the Commission, as the regulatory body, or the Price Administrator, as intervener, should control the scope of the investigation. We do not think that the mere right to intervene in a rate proceeding conferred upon the Price Administrator by the Act of October 2, 1942, includes the power to compel the regulatory body to undertake a complete rate investigation against its better judgment, much less an investigation upon lines contrary to the governing statute" (R. II, 442).

The Court of Appeals further said there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates and that:

> "The conflict arose when the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body" (R. II, 443).

The Court of Appeals said "the provision of the Amendatory Act, requiring prior notice and consent to intervention by the Presidential agency, were complied with" (R. II, 429,

430, 431). That Court found that counsel for the Price Administrator "was given all opportunity to participate within the scope of the proceedings fixed by the Commission" (R. II, 429).

The judgment of the District Court was reversed (one Justice dissenting) and the cases remanded with instructions to dismiss the appeals from the Commission's orders (R. II, 443).

SUMMARY OF ARGUMENT

I

The Commission issued an order for the annual investigation and determination of rates under the provisions of the sliding scale arrangement, and issued its "Notice of Hearing" for that specific purpose. "The hearing" conducted by the Commission was that authorized by its order of investigation and the notice of hearing.

The Price Administrator offered evidence of three witnesses and several exhibits, all of which were received by the Commission and given consideration in its determinaton and findings and Order No. 2401. He offered no other evidence. He cross-examined all witnesses and filed two briefs with the Commission. He was not limited in the presentation or offer of evidence in the hearing called for by the order of investigation of March 20 and the notice of hearing of July 21, 1942.

The Price Administrator had notice of the hearing and the right to present evidence, to cross-examine witnesses, to make argument, and to file briefs. He had a full and fair hearing.

The Price Administrator, on behalf of the Director, asked the Commission to reopen the proceedings for the purpose of permitting him to offer testimony concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities.

The proceeding was reopened for the purpose of permitting the Price Administrator, on behalf of the Director, to present additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and he was granted the right to intervene

When the hearing reconvened on November 2, for the purpose of receiving evidence on behalf of the Director, his counsel offered no evidence.

At the continued reopened hearing on November 4, counsel for the Director called an official of the Company for further cross-examination about a computation made by him and presented in evidence in August. The Director offered no other evidence. Having abandoned the purpose for which he sought intervention, the Director has no cause to complain. He had a full and fair hearing.

The fact that the Commission did not find persuasive the Petitioners' theories or evidence does not amount to denial of due process.

II

The Commission's findings and its order are supported by substantial evidence, and its findings are adequate to support the order. The Price Administrator has no authority to control or regulate public utility rates, and none of his legal rights has been invaded by the Commission's order. His appeal stated no cause of action.

The refusal of the Commission to depart from its order of investigation and its notice calling for the hearing violated none of the legal rights of the Petitioners. The issues sought to be raised by the Petitioners were outside of the scope of the order instituting the inquiry and the notice of hearing. The refusal of the Commission to review, in the instant proceeding, the provisions of Order No. 1458 and to revise the sliding scale method did not give the Petitioners a cause of action. The sliding scale arrangement was promulgated under statutory authority and

could not be attacked in the instant proceeding. The court below correctly directed that the appeals be dismissed.

III

The requests of the Petitioners, as interveners, that the Commission enlarge the issues and broaden the scope of the hearing for the purpose of permitting them to attack the provisions of the sliding scale plan, promulgated in 1935, were not in subordination to nor in recognition of the inquiry instituted. The effort of the interveners to depart from the order of investigation and the hearing called for by the notice was in defiance of the power of the Commission to act pursuant to its order and notice, and was an effort to dispossess the Commission of its jurisdiction to determine rates under the sliding scale method. Interveners may not come into a proceeding for the purpose of trying, in that proceeding, issues outside of the scope of the original inquiry. Interveners may not attack the propriety of the main proceeding or collateral decrees.

The Commission is authorized by statute to make reasonable rules governing its proceeding and to regulate the mode and manner of all investigations and hearings before it. The Commission, in the instant proceeding, acted in accordance with the statute, its Rules of Practice and orderly procedure. The purpose of intervention is to permit the intervener to litigate in that proceeding any rights he has therein, but not to litigate matters unrelated to the main proceeding.

IV

The Petitioners asserted a power which they do not possess, and which is violative of Congressional intent expressed in the Emergency Price Control Act. They asserted a power directly contrary to the express prohibition of Clause (2) of Section 302 (2) of the Emergency Price Control Act, and sought radiation beyond the obvious meaning of Section 1 of the amendment of October 2

This Court has recently held that the control of common carrier and other public utility rates was expressly denied the Price Administrator.

V

The question on review of the order of an administrative body, is whether "viewed in its entirety", it meets the requirement of statutory authority. In the determination of "just and reasonable rates", it is the result reached and not the method employed which is controlling. If the total effect of the order produces no arbitrary result, an administrative order supported by substantial evidence will not be disturbed by the court. The Commission was not bound by any single formula or combination of formulas in the determination of its administrative functions. The weight of the evidence is for the administrative body. A court is not at liberty to prescribe the general attitude the Commission must adopt towards the exercise of its discretion. Judicial action may not supplant the discretionary authority, even if the court should reach a different conclusion upon the evidence. Rate-making calls for enlightened judgment by a body appointed by law and best fitted by training and experience to determine complex questions involved in rate regulation. The legislative discretion implied in rate-making extends to the entire process, embracing the method used in reaching the determination, as well as that determination itself.

VI

The Commission gave consideration to all the evidence and every factor involved, and made its findings upon the evidence of record. In its determinations, it gave consideration to emergency conditions and the Government's policy to prevent inflation. The increase in rates authorized by the Commission was considerably less than the increase in labor costs experienced by

the Company during the test year. The rate increase was not in conflict with the Governmental policy to grant price increases where the cost of production and increase in wage rates justify such increases. An order of an administrative body carries with it a presumption of validity and he who seeks to override it carries a "heavy burden".

ARGUMENT

The Petitioners Had Full Notice of the Hearing with Full Opportunity, Which They Exercised, to Present Evidence, to Examine Witnesses and to Make Argument.

The principal contention made by the Petitioners below and here is that they were denied a full and fair hearing. What hearing? In what proceeding? The order of March 20, 1942 (R. I, 33), called for an investigation of the rates "in conformity with the sliding scale arrangement". That investigation was carried forward continuously from the date of the issue of the order for the purpose stated therein. Section 2 of the order gave notice of the intention of the Commission "to hold a public hearing on the subject matter of the investigations." On July 21, 1942, the Commission issued its "Notice of Hearing" (R. I, 34), of the time, place, and the subject matter of "the hearing". The subject matter of the hearing, as set forth in the notice was—

> "relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458".

That was "the hearing" conducted by the Commission. That was the proceeding instituted by the Commission. Following the provisions of the plan and the practice since the plan was

establishing in 1935, the accounting staff made a complete audit of the Company's books, taking 2,110 man hours (R. I, 88). The Company's accounts are kept in accordance with the Uniform System of Accounts for gas companies, prescribed by the Federal Power Commission and by this Commission (R. I, 47). Not only are the Company's accounts strictly regulated (which is not true of commercial enterprises over which the Price Administrator is given jurisdiction), but its rates, its charges, and its rules, practices and conditions of service are likewise regulated strictly in accordance with the Commission's orders.

When the audit was completed, and the Commission's staff made its determinations, "the hearing" began. The staff presented its studies and exhibits, detailed by the oral testimony of the Commission's Chief Accountant and Chief Engineer. The Company presented its evidence through its officials. The staff and the Company did not arrive at the same conclusions, because of certain adjustments made by the Commission's staff in the operating expenses and taxes, and those required by the provisions of the sliding scale plan (R. I, 41). The evidence shows (R. I, 87-89), that as a result of the audit the Company made adjustments in the operating expense accounts to conform with the requirements of the Uniform System of Accounts.

The authority to regulate public utility rates in the District of Columbia has been conferred upon the Commission. The question on judicial review of administrative findings under statutory powers, is whether the administrative body acted within its statutory authority. *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 160; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547; *Shields* v. *Utah Idaho Central Railroad*, 305 U. S. 177, 185. Did the Commission have authority to issue its Order No. 1458, establishing a sliding scale method of determining rates? Congress gave the Commission that

authority in Paragraph 18 of its Act (R. I, 246). Counsel for the Petitioners asserted that "in any determination of rates" the Commission cannot be governed by the sliding scale arrangement (R. I, 125); he said "as a matter of fact it would be illegal for the Commission to fix rates" without granting the requests he had made (R. I, 140).

Under the provisions of the sliding scale arrangement, the Commission instituted its annual investigation and gave notice of a formal public hearing on the subject matter of that investigation. That was the hearing conducted in Formal Case 316, resulting in the findings and opinion and Order No. 2401, entered October 13, 1942. The plan itself was established under the authority of Paragraph 18, as both the District Court (R. I, 15-16) and the Court of Appeals (R. II, 428) stated. The Commission's action in adopting a sliding scale arrangement pursuant to its Paragraph 18 is not subject to challenge by the Petitioners. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, 59, 61-62; *Federal Power Commission* v. *Natural Gas Pipe Line*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, October Term, 1943.

The record shows that the Price Administrator had notice of the hearing and participated in all proceedings; he had full opportunity to present evidence; he exercised the opportunity and presented evidence of three witnesses, including exhibits (R. I, 151-177). His counsel examined his own witnesses, and when he had finished, announced "That is all" (R. I, 169). He cross-examined at great length all witnesses presented by the Commission and the Company. His counsel made many and long arguments. He filed two briefs with the Commission (R. I, 40, 181). He had the right to challenge the evidence presented by the Commission's staff and by the Company. But he accepted the staff's audit of the operating accounts (R. II, 400) and the calculations made by it (R. II, 392). It was at this hearing, called by the notice of July 21, that the Price Administrator presented his evidence, cross-

examined witnesses, made arguments and filed briefs. This Court has said on many occasions that when such opportunity has been given a full and fair hearing has been granted. When such opportunity has been granted, due process is fully met. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388. Not only did the Price Administrator have the opportunity to present all evidence relating to the subject matter of the investigation, but he was requested on numerous occasions, by the Chairman of the Commission, to present any facts he had relating to the aims and purposes and policies of the Office of Price Administration and "the relation of these aims and purposes to the present proceeding". (R. 1, 123, 126, 133, 138, 139, 140, 143).

What hearing do the Petitioners refer to when they say they did not have a full and fair hearing? Not the one called for under the order of March 20, 1942, or the one held pursuant to the "Notice of Hearing" issued July 21, 1942.

The Price Administrator was allowed to intervene in the proceeding without objection. His counsel was granted a continuance of the proceeding from August 19 to September 4, 1942, for the purpose of preparing evidence to present and for the purpose of preparing cross-examination of all witnesses (R. 1. 102, 104). The hearing was reconvened and the Price Administrator's counsel cross-examined every witness who had testified, some at great length, and presented oral and documentary evidence, all of which was received. The Price Administrator had notice of the order of investigation and notice of "the hearing". He was "apprised" of the nature of the hearing and was "afforded the opportunity to offer evidence and to examine that of the opposition". Under the circumstances, he has had his "day in court, and may not now be heard to complain". *Ashbury Truck Co.* v. *Railroad Commission*, 52 F. (2) 263, affirmed 287 U. S. 570. The Petitioners had a full and fair hearing. *New England Divisions Case*, 261 U. S. 184; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165.

This Court in *Ballard* v. *Hunter*, 204 U. S. 241, 255, 51 L. ed. 461, said the fundamental requirement of due process is an opportunity for hearing and defense, "but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case."

In *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 194, this Court said the appellant was mistaken in its contention that it did not have such a hearing as it was entitled to have under the law when it had full notice of the action and appeared at the hearing with liberty to contest the facts and introduce any evidence "pertinent to the case" with the right to a full and fair disclosure of "the material facts". The right to challenge the provisions of Order No. 1458 and to establish a new method of determining a rate base and a new method of determining depreciation, and all of the other factors entering into a complete new valuation proceeding were not pertinent nor material to the order of investigation dated March 20, or to the notice of the hearing dated July 21, 1942.

As the record shows, and as Petitioners admit in their brief, they sought to have the Commission broaden the scope of the hearing and to enlarge the issues for the purpose of reviewing and revising the "basic phases" and the "basic elements" of the provisions of the sliding scale plan, promulgated by Order No. 1458. The Commission's refusal to enter into a different kind of investigation than that instituted by the order of March 20 and the notice of hearing of July 21, 1942, did not deny the Petitioners a full and fair hearing. Limiting the investigation and the hearing to the subject matter of the order and the notice was not a denial of procedural due process. In *American Toll Bridge Co.* v. *Railroad Commission*, 307 U. S. 486, 494, the Bridge Company asked the Railroad Commission of California to enlarge a rate investigation concerning tolls at Carquinez bridge. The Company moved that the Commission "include with this proceeding an investigation of the Antioch bridge tolls", and complained that it had been denied procedural due process because the Commission limited

the investigation to the tolls on the first bridge only. This Court said:

> "The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, and clearly there is no foundation for the claim that in excluding the Antioch the commission denied appellant procedural due process."

In *Bethlehem Steel Co.* v. *Natl. Labor Relations Board*, 74 App. D.C. 52, 120 F. (2) 641, at 651, the petitioners contended that it did not have a fair hearing on the ground, among others, that an application for a subpoena to an officer of the S.W.O.C. was denied. The petitioners desired to question the officer regarding the dates, scope, duration and terms of an agreement between S.W.O.C. and the United States Steel Corporation or any of its subsidiaries. The Court of Appeals for the District of Columbia said those agreements were irrelevant in the proceeding and "were not on trial". The Court there said a hearing is not made unfair by a refusal to summon a witness in order that he may be asked irrelevant questions. Neither can a hearing be made unfair by denying a motion to go into matters not relevant to the hearing instituted. This Court denied certiorari, 317 U. S. 652, to review the decision in *Alabama Power Co.* v. *Federal Power Commission*, 75 App. D. C. 315, 128 F. (2) 280, where the lower court found that the Company had been afforded every reasonable opportunity on the particular question involved but, instead, chose to challenge the power of the Commission and "failed to take advantage of the various opportunities". The Court therefore said the Company "has foregone the opportunity to question the propriety of the order". In *Natl. Labor Relations Board* v. *Ed. Friedrich*, 116 F. (2) 888, the respondent complained of an unfair hearing because, *inter alia*, the examiner "unduly limited respondent's right of cross-examination". The Court

of Appeals for the 5th Circuit said they found nothing of substance in the complaints of procedure at the hearing for the reason—

> "the matter inquired about was not material and if the cross-examination had elicited the answer respondent desired, the findings would not have been affected thereby. Proceedings of this kind are substantial in their nature, and however much respondent's spirit may be galled by unjust and arbitrary rulings, they furnish no ground for action here, unless injury has resulted from them."

The instant proceeding was reopened for the second time and set for further hearing on November 2 and 4, 1942, on a petition filed by the Price Administrator on behalf of the Director, for the purpose of permitting the Price Administrator to offer on behalf of the Director evidence concerning the comprehensive national economic policy developed in accordance with the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increase in rates and charges of common carriers or other public utilities (R. I, 59, 62-63). On those two dates, counsel for the Price Administrator offered no evidence on those subjects (R. I, 183-229). He completely abandoned the very purpose for which the proceeding was reopened the second time. In *Vandalia Railroad* v. *Public Service Commission*, 242 U. S. 255, the Railroad Commission of Indiana, upon petition of the Vandalia and other railroads, set down for hearing the question of modification of its order. At the re-hearing, the applicants withdrew their application for modification. The Vandalia contended that the order deprived it of property without due process of law. In answer to that contention this Court said:

> "And since the record shows that plantiff in error and

its associates were accorded a rehearing upon the very question of modification, but abandoned it, nothing more need be said upon that point" (Page 261).

Since counsel for the Director failed to offer any evidence in response to the petition on behalf of the Director to reopen the proceeding, he "failed to take advantage of the various opportunities" and "has foregone the opportunity to question the propriety of the order". *Alabama Power Company Case, supra.* Since his counsel failed to take advantage of the opportunity afforded, and since he abandoned the very purpose for which the proceeding was reopened for the second time, he has not been denied due process. He "could not complain that he was not given a fair hearing". *Ruse* v. *United States,* 129 F. (2) 204 (6th Circuit).

Having failed to use the opportunity afforded it by the hearing of November 2 and 4, there was no denial of due process. *Midland Realty Co.* v. *Kansas City P. & L. Co.,* 300 U. S. 109, 113, 114. This Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575,584, said:

> "So far as the order is supported by the evidence the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. *The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered.*" (Italic added.)

At Page 586 of that decision, the Court said:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power

has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

This Court in *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, October Term, 1943, referred to the above-quoted statement from the *Pipeline* case and said when the regulatory body's order is challenged in the courts, "the question is whether that order" viewed in its entirety "meets with the requirements of the Act". The Court continued:

"Under the statutory standard 'just and reasonable' it is the result reached not the method employed which is controlling. * * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

The Petitioners have utterly failed to show that the Commission's order is unjust and unreasonable in its consequences.

In the *Hope* case, this Court said it is not important "to determine the various permissible ways in which any rate base on which the return is computed might be arrived at". It will be remembered that the standard of "just and reasonable" in the Act under which the Federal Power Commission was acting is the same standard which Congress has prescribed for the Commission in the Act creating it.

The Petitioners have asserted that the Commission has failed to perform its duty under its own statute. The same contention was made by the Hope Natural Gas Co. in that the Federal Power Commission had not allowed a return for gas production that would be enough to induce private enterprise to perform its functions for the public. This Court said the Federal Power Commission was not oblivious to these matters. "It considered them". The Court added that no serious attempt had been made to show that they were inadequate, and said it cannot say they are inadequate "unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress has entrusted the decision". In the instant case, the Petitioners accepted the adjustment of operating expenses made by the Commission's staff and its calculations under the sliding scale method. The Petitioners did not offer a word of evidence as to the justness or reasonableness of existing rates or what constituted just and reasonable rates. If this Court may not substitute its opinion for the expert judgment of an administrative body, may the Petitioners substitute theirs for such administrative findings?

After the Commission had promulgated its order the Petitioners filed petitions for reconsideration, which were denied by the Commission. They offered no evidence in support of their petitions for reconsideration. They were "apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence". They have had a "full and fair hearing". *Carter* v. *Kubler*,

U. S. , 64 S. Ct. 1, 3, 4. They had ample opportunity to present whatever support they had, and they have had a full and fair hearing. *Crescent Express Lines* v. *United States*, U. S. , 64 S. Ct. 167, 169.

Limitation to Issues Raised by the Order Instituting the Investigation and the Notice of Hearing Is Not a Denial of a Full and Fair Hearing.

On Page 35 of their brief, the Petitioners complain because the Commission imposed "the same restrictions" upon the participation of the Director as were previously imposed upon the Administrator. When it is remembered that the same counsel who had appeared and participated throughout all proceedings on behalf of the Administrator, appeared on behalf of the Director, and made the same motions and the same argument, it is obvious why "the same restrictions" were imposed. When he appeared as counsel "on behalf of the Director", he did not offer any new witnesses or new evidence. If the Director has cause to complain, it is that his counsel did not do what his petition of intervention requested permission to do. He may not complain of denial of a full and fair hearing *because his counsel offered no evidence*. *Federal Power Commission* v. *Natural Gas Pipeline Co., supra.*

The Petitioners assert (page 36) that the Commission's order of October 23 restricted the Director to presentation of "additional evidence relating to the inflationary effect, if any, of an increase in the rates authorized by Order No. 2401". If we have correctly understood the position of the Petitioners, both here and below, it has been their contention that the Price Control Act and the Stabilization Act were for the purpose of preventing inflation. In fact, the Petitioners assert on Page 21 of their brief in this Court, that the purpose of the Stabilization Act "was to halt the inflationary trends then accelerating". Is it not, therefore, reasonable to expect that

if the Director had any evidence it would be evidence "relating to the inflationary effect" of the proposed increase in rates? Since his counsel did not offer any, it must be presumed that he had none, or such that he had would not have served his cause. If one has knowledge of facts, it is presumed he would produce them, and his failure to do so strongly suggests they would not support the position taken.

Lewis-Simas—Jones Co. v. *Southern Pacific Co.*, 283 U. S. 654, 663;
Baltimore and O. R. Co. v. *United States*, 298 U. S. 349, 381.

The Petitions of Appeal Fail to State Causes of Action for Which Relief May Be Granted, and the Court of Appeals Properly Directed that the Appeals be Dismissed.

The Commission's findings and opinion and the facts of record show there was ample evidence to support its findings. *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1, 14; *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 80; *State of Florida* v. *United States*, 292 U. S. 1, 12, 13; *Natl. Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 213, 224, 226. The Commission's findings are adequate to support its order. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663, 664; *State of Florida* v. *United States, supra*, at Page 11; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 406.

In view of the Commission's findings supported by substantial evidence, its action is not arbitrary or capricious. The decision below directing that the appeals be dismissed should be affirmed. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U. S. 295.

The Price Administrator has no authority to control public utility rates. None of his legal rights have been invaded by the Commission's action and therefore he has no right of ac-

tion against the Commission. *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 254; *Edw. Hines, Trustees*, v. *United States*, 263 U. S. 143, 148; *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479.

The refusal of the Commission to enter into an investigation different from that covered by its order of investigation and notice of hearing, violated none of their legal rights. *Alexander Sprunt & Son* v. *United States, supra; Edw. Hines, Trustees* v. *United States, supra.*

The issues raised by the Petitioners before the Commission were not germane nor related to the inquiry instituted, and the refusal of the Commission to reconsider and revise the provisions of Order No. 1458 did not give the Petitioners a cause of action. *Powell* v. *United States*, 300 U. S. 276, *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 44 L. ed. 782; *Pittsburgh & W. Va. Ry. Co.* v. *United States, supra.*

The promulgation of Order No. 1458 creating the sliding scale plan was authorized by statute, and could not be attacked in this proceeding. Therefore their appeals stated no cause of action, and were properly dismissed. *Utah Fuel Co.* v. *Natl. Bituminous Coal Commission*, 306 U. S. 56; *Edw. Hines, Trustees* v. *United States, supra; Home Furniture Co.* v. *United States*, 271 U. S. 456; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469; *Standard Oil Co.* v. *United States*, 283 U. S. 235.

The actions of a regulatory body carry with them a presumption of validity and the burden is upon one seeking to attack them, both to allege and prove facts to overcome the presumption. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Pacific States Box & Basket Co.* v. *White, supra.*

Interveners May Not Change or Enlarge the Issues nor Broaden the Scope of the Proceeding. The Interveners may not Control the Range of Investigation of an Administrative Body.

The principal contention of the Petitioners is that they were denied a full and fair hearing because the Commission refused to enlarge the issues and broaden the scope of the hearing for the purpose of permitting them, as interveners, to attack the sliding scale arrangement. They asked the Commission to review, reconsider and revise the provisions of Order No. 1458. These requests were not in subordination to nor in recognition of the inquiry instituted by the Commission. Indeed, they were in defiance of the order of investigation and the notice of hearing. They challenged the power of the Commission to make "any determination of rates" under the formulas "contained in the sliding scale arrangement" (R. I, 125), and asserted "as a matter of fact it would be illegal for the Commission to fix rates" without granting their requests (R. I, 140).

This challenge of the Petitioners of the Commission's power to make a determination of rates under the plan; and assertion that the determination of rates thereunder without granting their requests would be illegal, was antagonistic to the very purpose for which the Commission issued its order of investigation and its notice of hearing. Their challenge was an effort to dispossess the Commission of its authority contained in Paragraph 18 of the Act. The attack upon the proceeding clashes with orderly procedure and is contrary to the very purpose of intervention.

The 8th Circuit in *Adler* v. *Seaman*, 266 F. 828 (certiorari denied, 254 U. S. 655), defined intervention as follows:

> "It is a method of practice by which one having an interest or right, which will be affected by existing litigation to which he has not been made a party, may,

> if he desire, by leave of court come into that litigation to protect such interest or right. Rocca v. Thompson, 223 U. S. 317 * * *. It is not an independent action, but is ancillary and supplemental to the existing litigation (Rouse v. Letcher, 156 U. S. 47, * * * 39 L. Ed. 341), and must, under the limitations expressed in rule 37, 'be in subordination to, and in recognition of, the propriety of the main proceeding.'"

This Court said in *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U. S. 53—

> "The intervener was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervener be so enlarged. It is limited to the field of litigation open to the original parties." (Page 57-58.)
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> * * * * * * * *
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> "The purpose for which permission to intervene may be given is that the applicant may be put in position to assert *in that suit* a right of his in respect of something *there* in dispute between the original parties." (Page 59.) (Italics added.)
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> * * * * * * * *
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> "Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill." (Page 59.)

By coming into the investigation, the Petitioners as interveners, did not deprive the Commission of its right to proceed with the investigation instituted by it. The interven-

tion has in no way changed the nature of the proceeding nor did it change the rights and powers of the Commission. *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535, 542, 543; 30 L. ed. 1235.

To permit intervention, the interest and rights of the intervener must be in the subject of the original investigation ordered by the Commission. *Smith* v. *Gale*, 144 U. S. 509; 36 L. ed. 521.

The Petitioners, as interveners, were not entitled to be heard upon a reconsideration and revision of the provisions of the sliding scale plan except in a proceeding instituted for that purpose. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 258. The conduct of the Petitioners, as interveners, must be ancillary to the investigation ordered and their participation therein limited to such proceedings. *Guerra* v. *American Colonial Rank*, 21 F. (2) 56, certiorari denied, 275 U. S. 567.

In *Premium Ice Co.* v. *Maltbie*, 43 N. Y. S. (2) 71, the Public Service Commission had canceled a rule and regulation filed by the utility as a part of its rate schedule and substituted another rule and regulation therefor. The Ice Company asked the Commission "to broaden the scope of the hearing to include the reasonableness generally of the rates, charges and regulations" of the utility, which the Commission refused to do. The Court said, "Certainly the Commission was not required to grant the request" to broaden the scope of the hearing to include rates generally.

In *In re Schemmer*, 112 F. (2) 311 (7th Circuit), this Court denied a writ of certiorari (311 U. S. 697) to compel a court to permit intervention for the purpose of attacking an order appointing an adviser and to vacate the order providing compensation for his services in a reorganization proceeding.

The 10th Circuit, in *White* v. *Hanson*, 126 F. (2) 559, affirmed the decree denying intervention, in which new and independent issues were set forth. The 7th Circuit affirmed

a decree denying a petition to intervene which raised new issues in *Austin* v. *Garard*, 61 F. (2) 129.

The Court of Appeals for the 4th Circuit has, in several instances, held that intervention must be in subordination to and in recognition of the propriety of the original proceeding and that interveners may not litigate questions outside of those issues and not within the scope of the original suit. Thus in *Board of Drainage Commissioners* v. *Lafayette Southside Bank of St. Louis*, 27 F. (2) 286, 296, it said that to seek intervention with a view to challenging the jurisdiction of the Court "or otherwise inaugurating litigation not within the scope and purview of the original suit" is not permissible. In *State of North Carolina* v. *Southern Railway Co.*, 30 F. (2) 204, 207, that Circuit affirmed a lower court decree dismissing bills of intervention because the interveners sought "to litigate questions outside of the issues made by the original pleading" not within the scope of the original suit. In *Union Trust Company* v. *Jones*, 16 F. (2) 236, 239, the 4th Circuit said an intervener could not come into a case and attack and disposses the court of its jurisdiction to proceed in an orderly way.

The 8th Circuit has held that interveners may not dispossess a tribunal of its jurisdiction and try matters not within the scope of the original proceeding or attack the propriety of the main proceedings. *Whittacker* v. *Brictson Mfg. Co.*, 43 F. (2) 485, 490. In *In re Veach*, 4 F. (2) 334, 336, the 8th Circuit said that counsel for the intervener frankly admitted his only purpose was "to launch an attack against the propriety of the proceedings" and refused intervention for that purpose.

It is a well-established principle of law that one may not intervene in a proceeding for the purpose of attacking a decree in that proceeding or a collateral decree. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 556; *King* v. *Barr*, 262 F. 56 (9th Circuit).

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-143, this Court said that regu-

latory bodies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties". The Court said:

> "Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, *to control the range of investigation* in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." (Italtics added.)

In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 304, the Corporation attacked gas rates fixed by an order of the California Commission. In affirming the order, this Court said:

> "We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the court. We do not sit as a board of revision, but to enforce constitutional rights. * * * *The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself.* We are not concerned with either, so long as constitutional limitations are not transgressed." (Italics added.)

That general principle has recently been reaffirmed by this Court in the *Natural Gas Pipeline case* and in the *Hope Natural Gas Company case.*

Paragraph 32 of the Act creating the Commission (R. II,

248) gives the Commission power to adopt reasonable and proper rules and regulations "and to adopt and publish reasonable and proper rules to govern its proceeding and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it".

Pursuant to that power, the Commission issued its Rules of Practice and Procedure which provide that the granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where expressly requested and expressly granted after opportunity for hearing by all parties (R. I, 252).

The Commission conducted its proceeding in accordance with its statutory powers, its Rules of Practice and the orderly procedure in intervention cases.

Intervention Under Emeregency Price Control Act and Amendment of October 2.

We have at some length dealt with the status of an intervener and reached the inescapable conclusion that, as such, he is without authority to broaden the scope of the hearing. Does the Emergency Price Control Act of 1942 (56 Stat. 23) confer on the Price Administrator such authority as to require a different determination to be made in this case? The Act in terms denies to the Price Administrator authority to regulate "(2) rates charged by any common carrier or other public utility". It is conceded that the Washington Gas Light Company is a public utility within the meaning of the statute in question.

This Court in *Davies Warehouse Company* v. *Bowles*, decided January 31, 1944, considered rather fully the legislative history relating to the Emergency Price Control Act and the reasons underlying the action of Congress in refusing to vest the Price Administrator with jurisdiction over common carriers and public utilities. The Price Administrator, insofar as he appears as such, is without authority to deal with the mat-

ter of rates of public utilities. The question now, therefore, for determination is what authority was vested in the Director of Economic Stabilization by the order of the President designating him to receive the notice required by the amendment of October 2, 1942, which statute also required a public utility seeking a general increase to assent to intervention.

Neither the amendment itself nor the legislative history underlying it indicates the slightest intent on the part of Congress to interfere with the functions, duties, and jurisdiction of the various utility commissions of the United States, state or city. In fact, the contrary is clear. First of all, the amendment is directed to the utilities and not to the regulatory bodies. Under a literal reading of this amendment, if a company gave notice to the President and assented to intervention, the statute would be satisfied, even though the Commission should refuse to grant intervention, there being no requirement that a regulatory body acquiesce in such intervention. It, therefore, certainly cannot be contended under this statute that there is a denial of a full and fair hearing where the utility gave notice and assented to intervention and the petitioner was granted the right to intervene by the Commission for the purpose set forth in said petition.

While it is true that the Act of October 2 was not in effect when the Price Administrator sought to prevent the increase granted the Davies Warehouse Company by the California Commission, the logic and reason which the Court presented for the deliberate refusal of Congress to vest the Price Administrator with authority over the rates of common carriers and utilities is equally applicable as a bar to any attempt to interpret the amendment of October 2 as conferring such authority, as such construction would, as here demonstrated, result in conflict between Federal authorities and State authorities (the Public Utilities Commission of the District of Columbia falls in the latter category).

In dealing with the Emergency Price Control Act and after

the amendment of October 2, this Court said in the *Davies Warehouse* case, *supra*:

> "We think Congress desired to depart from the traditional partitioning of functions between state and federal government only so far as required to erect emergency barriers against inflation. No question as to the power of Congress to reach and regulate this business, should it find it necessary to do so, has been raised here. But as matter of policy Congress may well have desired to avoid conflict or occasions for conflict between federal agencies and state authority which are detrimental to good administration and and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-interest under control. Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision. In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress did not intend, and certainly has given no clear indication that it did intend, to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility. * * *"

Likewise in this case the Court said:

> "* * * Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked

in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that 'the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions."' * * *" .

We submit that the Commission in reopening a hearing which had been closed prior to the Act of October 2 and permitting intervention of the Price Administrator on behalf of the Director of Economic Stabilization with all the privileges and rights of an ordinary intervener, plus the specific right to intervene for the purpose of showing the inflationary effect, if any, of a proposed increase, satisfied liberally the requirements of the Act of October 2. The Emergency Price Control Act, as amended, neither in terms nor by any reasonable construction vested the Director with the right to enlarge the scope of the proceeding, or to change the method of determining the rate base, depreciation, rate of return, or other basic elements. In fact, the legislative history, as interpreted by this Court, clearly and unmistakably shows that Congress deliberately and intentionally denied the Price Administrator the right to control prices of common carriers and utilities, and merely required the utility to give notice and assent to intervention. To do otherwise would encroach upon the prerogatives of the regulatory bodies, cause conflict, and do far greater

harm than would any increase which might be granted by regulatory bodies.

In connection with the decision in the *Davies Warehouse Company* case, *supra*, it is interesting to note that the warehouse company had not had its rates increased since 1938, but that wages and cost of materials had increased. The California Commission in authorizing a general 15% advance said it would "permit applicants to increase their rates to reimburse them in part for their added labor expense." In the case at bar there had been no increase in rates since prior to 1935, when the sliding scale arrangement became effective, but here, too, there had been a substantial increase in wages, in fact in an amount which exceeded the increase in rates permitted by the Commission. The Public Utilities Commission of the District of Columbia found:

> "This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure."

Furthermore, the increase here authorized was only 2.28% and increased the cost of living index in the District of Columbia by only about 1/37 of 1%.

Petitioners Assert a Power, Which Has For Its Purpose and Direct Consequence the Destruction of State and Municipal Powers in the Field of Local Utility Rate Regulation.

In the introductory part of their argument, the Petitioners asserted on Page 20 of their brief—

"It will be observed that the questions raised do not turn on the mere construction of a local law and are not of limited local importance. Not only are the duties of the Commission under its statute essentially like those of federal rate-making bodies, but those duties cannot be considered apart from the supervening effect of national conditions and national legislation".

The Petitioners have devoted Pages 57 to 78, inclusive, of their brief to an effort to draw an inference of power from the Emergency Price Control as amended by the Stabilization Act. Their contentions have been answered by this Court in *Davies Warehouse Company* v. *Bowles*, No. 112, October Term, 1943, and in *City of Yonkers* v. *United States*, ___ U. S. ___, 64 S. Ct. 327, at page 331, where this Court said the existence of federal authority to act should appear affirmatively and not rest on inference alone.

In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351, this Court said:

"* * * bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in Sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

What the Court said in that case is most appropriate here, that—

"An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress" (Page 355).

The Determination of Fact Questions that Have Been Committed to Administrative Bodies Will Not Be Set Aside By the Courts if There Is Substantial Evidence to Support Them. The Ultimate Question on Review of Such Administrative Determinations Is Whether the Total Effect of an Administrative Order Is Unjust and Unreasonable. Administrative Bodies Are Not Bound by a Single Formula or Combination of Formulas.

In *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, October term, 1943, this Court said if the total effect of an administrative body's rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end. The fact that the method employed to reach the result may contain infirmities is not then important. An administrative body's order does not become suspect by reason of the fact that it is challenged. He who would upset the rate order made under statutory power has the heavy burden of making a convincing show that it is invalid because it is unjust and unreasonable in its consequences.

In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, this Court said (page 586):

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produced no arbitrary result, our inquiry is at an end."

The ultimate question for the Court in review of the Commission's Order No. 2401 is the end result or the totality of the consequences of its order. *Hope Natural Gas* case, *supra*. *Railroad Commission* v. *Pacific Gas & Electric Company*, 302 U. S. 388, 394; *West Ohio Gas Company* v. *Public Utilities Commission*, 294 U. S. 63, 70; *Federal Power Commission* v. *Natural Gas Pipeline Company, supra*.

In *Railroad Commission* v. *Pacific Gas & Electric Company, supra*, this Court said the right to a fair and open hearing includes notice and opportunity to be heard and the regulatory body must act upon evidence and not arbitrarily. It said that when the rate-making agency gives a fair hearing, receives and considers "the competent evidence that is offered", and affords opportunity through evidence and argument to challenge the result and make such determination upon evidence and not arbitrarily, the requirements of procedural due process have been met, and the question that remains for the Court "is not as to the mere correctness of the method and reasoning adopted by the regulating agency, but whether the rates it fixes will result in confiscation" (page 394). The Court also said that the regulatory body's opinion shows precisely what it had done. The order here under attack shows precisely what the Commission did in the instant proceeding. It received all competent evidence. The Petitioners were afforded opportunity through evidence and argument to challenge the result. They offered no evidence challenging the justness or reasonableness of the rates involved. They did not suggest any rate schedules. They have utterly failed to show they were denied due process of law. The Court there said that the Court below was bound to go to the regulatory body's opinion to ascertain its findings (Page 400).

The Commission's findings and opinion are found at Record Pages 39 to 55, inclusive. The Commission discussed the evidence and made its findings of what it considered to be just and reasonable rates under the evidence. The Commission gave

consideration to the existing emergency conditions as found by its statements at Record Pages 40, 41, 45 and 48.

The Commission made its findings that an increase in rates was warranted and discussed its findings in that respect (R. I. 51-53). It then discussed the effect of the increased rates and said (R. I, 53-54):

> "The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase. Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating customer's bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year.
>
> "The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only about 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies."

This Court has consistently and for a long time maintained the principle that determination of fact questions that have been committed to administrative bodies will not be set aside by the Courts if there is substantial evidence to support them. *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304; *Interstate Commerce Commission* v. *Hoboken Manufacturers Railroad Company*, ____ U. S. ____, 64 S. Ct. 158, 164; *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402, 408; *Swift & Co.* v. *U. S.*, 316 United States 216;

220-225; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146.

Even though upon a consideration of all the evidence the Court may reach a different conclusion from that reached by the administrative body, the Court is not authorized to substitute its own judgment for that of the administrative body. *Swagne & Hoyt* v. *United States*, *supra*, at page 304; *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206, 226; *Virginia Electric & Power Company* v. *National Labor Relations Board*, 319 U. S. 533, 542-543.

It is not the province of a Court to absorb the function of administrative bodies. *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282, 286; *Gray* v. *Powell*, 314 U. S. 402, 412. In review of administrative findings the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Mississippi Valley Barge Line Company* v. *United States*, *supra*, at page 287. *Rochester Telephone Corporation* v. *United States*, *supra*, at page 146. Upon such review only questions affecting the constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the administrative body's order becomes incontestable. *Rochester Telephone Corporation* v. *United States*, *supra*, at page 140; *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547.

Rate-making involves complicated and technical questions, the determination of which calls for the exercise of judgment of a body of experts informed by experience and training who have been brought into existence as best fitted to make such determinations. *United States* v. *Chicago Heights Trucking Company*, 310 U. S. 344, 353; *Armour & Co.* v. *Alton Railroad Company*, 312 U. S. 195, 200, 201; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *State of Florida* v. *United States*, 292 U. S. 1, 12. The structure of a rate

schedule calls in peculiar measure for the use of that enlightened judgment which the Commission, by training and experience, is qualified to form. *Mississippi Valley Barge Line Company* v. *United States, supra; State of Florida* v. *United States, supra.*

Petitioners Argue that the Commission and the Court of Appeals Misconstrued the Purpose and Nature of the Administrator's Requests. The Courts and the Commission Correctly Understood Their Position.

The Petitioners have argued, beginning on Page 51 of their brief, that the Commission and the Court of Appeals misconstrued the purpose and nature of the Administrator's requests. If this is true, the District Court also misunderstood the real purpose of the requests, because it said:

> "The Commission was requested to reconsider the basic principle of the sliding scale arrangement * * *." (R. I, 17.)

The District Court stated the Administrator contended that the Commission nullifed intervention "by refusing to reconsider the basic principles of the sliding scale arrangement", and that the Commission "refused to broaden the scope of its inquiry" (R. I, 17). That Court further found that the Commission regarded the inquiry within "the scope of the order of March 20" (R. I, 18).

The Commission, the District Court and the Court of Appeals all have stated the purpose of the interveners to be the same. The Court of Appeals said the important issue turned upon the action of the Commission "in refusing a demand of the Price Administrator that a thoroughgoing examination be made into the rate base, the rate of return, operation expenses and depreciation, and all other matters relative to the establishment of a fair return" (R. II, 431).

The Court of Appeals understood the requests of the inter-

veners exactly as did the District Court and the Commission. The Court quoted from the intervener's brief in that Court where it said it was "incumbent upon the Commission to reconsider all basic elements of the sliding scale arrangement" (R. II, 440).

In view of the foregoing facts, it cannot be said that anybody has misunderstood the purpose of the Price Administrator.

Evidence Offered by Petitioners Was Received and Considered by the Commission.

The Administrator offered testimony of three witnesses and several exhibits, all of which were received in evidence. The first witness described the toughness of the war and the emergency conditions resulting, and the policies of the Office of Price Administration. The second witness was the technical expert from the Federal Power Commission. He disclaimed any intention to go into the rate base. (R. I, 164). He testified and presented Exhibit No. 8, in which he accepted all the findings of the Commission's staff and the Company's witnesses except that he made a calculation for depreciation on the sinking fund method at the "suggestion" of counsel for Petitioners (R. I, 160), and computed income taxes at the rate of 19%. These were the only departures from the calculations made by the Commission's staff. This exhibit is reproduced at Record Page 420.

The third witness presented by the Petitioners was an assistant business analyst who presented three exhibits (Exhibits Nos. 10, 11, 12), all of which were received as evidence and are reproduced at Record Pages 421 and 422. Exhibit No. 10 (R. II, 421) shows on its face that it was taken from the Company's "annual report to stockholders", as admitted by the witness (R. I, 170). Exhibit No. 11 shows on its face that it was taken from the "annual report of the Public Utilities Commission, of the District of Columbia, 1940" (R. II, 421),

and was so admitted by the witness (R. I, 171). Exhibit No. 12 shows on its face that it was taken from "Federal Trade Commission report on Utility Corporations" and was so admitted by the witness (R. I, 172). The witness said the figures shown on Exhibit No. 12 were merely taken out of the report of the Federal Trade Commission (R. I, 174). It "was copied" from that report (R. I, 173). The exhibit includes appraiser's value made in 1903 and 1909. The witness, of course, knew nothing about the appraisal, or who made it, or the purpose of the appraisal. The exhibit purports to show the average capital employed and the rate of return from 1927 to 1934. The return is based upon the capital employed as shown in the exhibit, yet the witness who presented it did not know that the Commission had made a valuation of the Company's property in 1918 and in 1934 (R. I, 174).

The testimony of these three witnesses, including their exhibits, was all that the Price Administrator offered. When the exhibits were presented and the source from which they were taken had been stated and they were received in evidence, counsel for the Petitioners announced "That will be all" (R. I, 172).

The evidence, including the exhibits presented by the Petitioners, was received by the Commission and considered by it in its determination. The Chairman of the Commission stated that the Petitioners' evidence would be given weight by it "in the consideration of the case as a whole" (R. I, 183). In consideration of the record, the Commission gave consideration to existing conditions and the bearing of such conditions upon the questions before it (R. I, 40). It stated "careful study has been given to all factors having a bearing upon those problems in arriving at the decisions hereinafter set forth" (R. I, 41). In the consideration of the reasonableness of taxes to be allowed as an operating cost, the Commission said it weighed all the factors to the best of its ability (R. I, 48). Upon a study of the entire record, the Commission said that after considera-

tion of all factors having a bearing upon the case, it was of opinion that rate increases were warranted (R. I, 51).

At Page 21 of their brief, the Petitioners say the purpose of the Act of October 2, 1942, "was to halt the inflationary trends then accelerating". The proceeding was reopened for the second time to permit the Price Administrator to present evidence on that precise question. He did not call any new witnesses (R. I, 183-229).

It is argued (Page 54) that practically all such evidence was ignored by the Commission. The courts have never held that administrative orders are illegal because the triers of the facts were not convinced by testimony, particularly that kind that is conjectural and without knowledge on the part of the witness who presented it.

In *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, decided January 3, 1944, this Court approved the rejection by an expert body of testimony that was not convincing and did not have probative value. Citation of authority is not necessary to show that the weight of the evidence and the inferences to be drawn therefrom are for the regulatory bodies. This Court, in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 668, said the fact that arguments of Petitioners and their testimony "has not proved persuasive" affords no basis for the contention that the regulatory body's action in making the order "was arbitrary or otherwise illegal".

The Petitioners assert (Page 54) that the Commission's failure to broaden the scope of the inquiry was because of its overestimate of administrative difficulties. No such language is found in the Commission's rulings and it is not the reasons stated by the Commission or by the District Court which vacated the Commission's order. The District Court said that the Commission regarded the inquiry "within the scope of the order of March 20" (R. I. 18), and for that reason found its action was arbitrary and illegal. The Chairman of the Commission stated the reason for refusing to review and revise the

basic elements of the sliding scale was because it was "not within the scope of the present proceeding" (R. I, 122). The present proceeding, of course, was instituted by the order of March 20, 1942, referred to by the District Court. The applicability the Petitioners seek to draw from *Phelps Dodge Corp.* v. *Natl. Labor Relations Board*, 313 U. S. 177, 198, that the Commission overestimated administrative difficulties, is not in point. The second sentence quoted by Petitioners from that case, however, is in point when it was said that all that was asked of the Board was to show that it "has exercised the discretion with which Congress has empowered it".

It is because the Commission "exercised the discretion with which Congress has empowered it" in the instant proceeding that the Petitioners are complaining. It is precisely because the Commission exercised the powers delegated to it by Congress, that the Petitioners contended that the Commission's order is illegal. That discretion is found in the language of Paragraph 18 of the Act creating the Commission (37 Stat. 980, Sec. 43-217, D. C. Code 1940), which the Petitioners did not quote, that the sliding scale arrangement shall not be lawful "until it shall be found by the Commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section". The right and power to make changes in the plan is specifically reserved to the Commission as it "may ascertain and determine to be necessary and reasonable". The Chairman of the Commission announced that when the Commission decides to open an investigation into the basic elements of the sliding scale "it will give appropriate notice and conduct that investigation as a separate problem" (Page 772, proceeding before the Commission).

The Petitioners say the Administrator possessed substantial evidence dealing with the financial history of the Company, and that practically all such evidence was ignored by the Commission (Page 53). Such financial history as the Administrator presented through his witness and his exhibits were compiled from reports to stockholders, the Commission's own

annual reports, and reports of the Federal Trade Commission (R. II, 421-422). The Commission's staff offered in evidence a complete financial history of the Company, including all of its financing in the proceedings of two finance dockets before the Commission, as Exhibit No. 3. To show that the Commission did not ignore the testimony dealing with the financial history of the Company, reference is made to the Commission's findings and opinion (R. I, 43-44, 50-51).

The Petitioners Were Not Denied a Fair Trial Because the Commission Did Not Find Persuasive Their Testimony and Theory that the Sinking Fund Method Is the Only Lawful Method of Determining Depreciation.

On pages 36 to 45 of their brief, the Petitioners complain because the Commission did not change the method of determining depreciation, as set forth in the sliding scale plan, to a sinking fund method. They say (page 41) that the Commission did not give them a full and fair hearing because they were not permitted to introduce testimony or that the Commission did not give "evidence of its consideration".

The statement of Petitioners that the Commission denied them the right to offer evidence on the question of depreciation is contrary to the record. Mr. Joseph, referred to elsewhere by the Petitioners as "one of the principal technical experts in the employ of the Federal Power Commission" (page 53), presented his evidence, including Exhibit No. 8, at the hearing on September 14, 1942 (R. I, 158, 169). Preceding the explanation of the witness's conclusions, the following question and answer appear (R. I, 160):

> "Mr. Booth: What is the basis for the change which you have made with respect to the item of depreciation?
>
> "Mr. Joseph: Pursuant to your suggestion, I used the sinking fund basis for depreciation to arrive at

the annual provision for depreciation shown in my exhibit."

The following question and answer appear at record page 162:

"Mr. Booth: Did you conclude your explanation as to why you used an interest rate of 6½ per cent, Mr. Joseph?

"Mr. Joseph: I think I did, Mr. Booth."

Continuing, the following questions and answers appear at record pages 166-167:

"Mr. Booth: Mr. Joseph, after making the adjustments which you have discussed, do you find that there is an excess or deficit in this company's basic return?

"Mr. Joseph: I find there is an excess.

"Mr. Booth: What is the amount of the excess in basic return?

"Mr. Joseph: $95,335."

The exhibit presented by Mr. Joseph was received in evidence and is reproduced in the record before this Court at page 420, and shows it was received in evidence on September 14. The exhibit shows the rate base, the adjusted operating revenues, operating expenses, including depreciation on "6½%—43-year Sinking Fund on $26,000,000". It shows the excess in basic return of $95,335, as testified to by the witness and the amount available for rate reduction of $47,668 (R. II. 420). The following question and answer appear at page 169 of the record:

"Mr. Booth: Do you have anything further to add at this time, Mr. Joseph?

"Mr. Joseph: I think not, Mr. Booth.

"Mr. Booth: That is all."

The Petitioners assert that the hearing cannot be regarded as a full or fair hearing, because it is quite evident, as they contend, that the Commission "accorded no consideration" to the sinking fund method of determining depreciation, prepared by Witness Joseph "at the suggestion" of the Petitioners' counsel. The rejection of evidence that is not persuasive or evidence that is too conjectural to have probative value does not mean that "a full and fair hearing" has been denied. Nor does the rejection of conjectural evidence in the consideration and determination by a regulatory body constitute arbitrary and illegal action. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 307, 310, 311, 319; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 299; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 397, 398; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164.

In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, and in *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, decided January 3, 1944, this Court sustained the action of the Federal Power Commission in rejecting evidence that was not persuasive.

The contention of the Petitioners is that the Commission did not give them a full and fair hearing because it refused to accept the sinking fund method submitted by their witness, instead of the modified straight-line method provided in the sliding scale plan. Justification for the Commission's rejection of the depreciation determined by witness Joseph may be found in statements of the witness reproduced in the Petitioners' brief at pages 37 to 40, inclusive. The witness was asked by his own counsel how he arrived at the amount of $26,000,000 as a sinking fund upon which to apply the sinking fund interest rate, and he answered that it represented his "estimate of the maximum amount of depreciable property contained in the rate base figure of $28,088,332", shown by the Commission's staff (page 38 of Petitioners' brief; R. I. 163). The determination of a reasonable allowance for depreciation

is, of necessity, an estimate, because no one can measure in exact dollars the physical depreciation taking place in the property in a year. But in the determination of depreciation allowance, the base upon which the estimate is predicated should bear some relation to reality. An estimate based upon an estimate, merely to arrive at a desired result, has no probative value. The refusal by the Commission to give consideration to such conjectural testimony does not have any relation to "a full and fair hearing", nor does it make the Commission's findings arbitrary and illegal.

The witness had made no study of the property accounts or of the property itself, and did not show a familiarity with the physical property. All of the basic figures contained in his Exhibit No. 8 are merely lifted from the Commission's exhibit and the Company's exhibit, except the witness's calculation of depreciation on the sinking fund method and computation for Federal income taxes at 19%. The record indicates that the witness did not know the basic difference in the kind of operation conducted by the Company and that conducted by the Natural Gas Pipeline Company, as indicated by his answer to the Chairman of the Commission, when the Chairman asked him if he could mention "any points of similarity between the Natural Gas Pipeline Company and the Washington Gas Light Company in the nature of their business". The witness answered that the *nature of accounting* for both companies is precisely the same in that they keep their records under the Uniform System of Accounts prescribed by the Federal Power Commission (R. I, 165). But the Uniform System of Accounts does not specify the method to be used for computing depreciation expense. To illustrate, in the *Natural Gas Pipeline* case depreciation was computed on the sinking fund basis, and in the *Hope Natural Gas Company* case it was computed on the "straight-line service life method" 44 P.U.R. (N.S.) 119. This Court approved both methods of determining depreciation allowances in those two cases, where the Uniform System of Accounts was used.

Thus, it appears that the only justification which the witness could give to support the petitioners' claim that the sinking fund method should be substituted for the sliding scale method, is entirely without merit. In the *Natural Gas Pipeline* case it was estimated and agreed that the property would expire by the year 1954, whereas the Company here involved is a retail distributing company with an indefinite life, serving a growing metropolis. The Company has been in existence since 1848. The evidence indicates an anticipated expansion and growth of its business.

The Petitioners contended before the Commission that the only "legal" method of computing accruals for depreciation was the sinking fund method, because this Court approved that method in the *Natural Gas Pipeline* case. But the decision in the *Hope Natural Gas Company* case, where the straight-line service life method was used by the Federal Power Commission and approved by this Court, completely nullifies this contention.

The Petitioners contended that the sinking fund method is one of the basic principles of rate-making. In support of that statement, they quote in footnote 12, on page 42 of their brief, from a report of the Committee on Depreciation, National Association of Railroad and Utilities Commissioners (1943, from page xix). The quotation from that report does not even suggest the sinking fund method as being a proper method for rate-making purposes. Particular attention is called to the language of that Committee's report, where they said the sinking fund method "may sometimes be used in rate making". But the Petitioners failed to quote the conclusion of the Committee on Depreciation of the National Association of Railroad and Utilities Commissioners, found in the same report and on the same page, where the Committee said:

> 41. "The use of the straight-line method in determining both depreciation expense and accrued depreciation is *generally recommended for rate making purposes.*" (Italics added.)

The Petitioners further contend that the interest rate on the sinking fund should be the same as the rate of return, and in support thereof cite the conclusion of the Committee on Depreciation. This is additional proof of the wisdom of the Commission in rejecting the sinking fund method for use under the sliding scale method of fixing rates. In order to amortize a fixed amount over a fixed period of time, the sinking fund method requires a constant interest rate and, if as the Petitioners contend the interest rate should be the same as the rate of return, the rate of return must also remain unchanged or there would result either an understatement or an overstatement of previous depreciation accruals whenever the rate of return should be changed. The rate of return is built upon varying factors, and with each fluctuation in any of those factors resulting in a change in the rate of return, it is evident that the purpose of depreciation accounting would not be accomplished if the interest rate on the sinking fund were changed accordingly.

There are more cogent reasons for rejecting the sinking fund method proposed by the Petitioners in the instant proceeding. They offered no evidence as to the adequacy or inadequacy of the reserve created by the use of the sliding scale method of accruing depreciation; they offered no evidence as to the adequacy or inadequacy of the amount of the accrual computed under the method they suggested; they offered no evidence that 43 years even approaches a proper life expectancy of the property; they offered no evidence of the effect of future property changes in the sinking fund method they suggested. All of these factors were determined by the Federal Power Commission in the *Natural Gas Pipeline Company* case, where a sinking fund method was used. On the other hand, the Commission made an investigation and held hearings and had all pertinent facts relating to these important factors when it adopted the depreciation method in the sliding scale arrangement. This method has been twice approved by the District Court of the United States for the District of Colum-

bia in *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity Nos. 35336 and 35341, in 1924 and again in 1932, when it found "the great desirability of retaining in effect the sliding scale method". There is additional reason for not accepting the rate of interest on the reserve balance suggested by the Petitioners, and that is that depreciation is not determined by the Commission for rate-making purposes under a sinking fund method.

In brief, the Petitioners complain, not that the accrual for depreciation allowed by the Commission as an expense is excessive or that the reserve for depreciation is excessive or inadequate, but that the Commission did not blindly accept a method in which a computation was quickly made producing a smaller figure, in place of the method which had been found to be just and reasonable to both the rate payers and the Company. Whether the accrual allowed by the Commission or the reserve for depreciation was excessive or inadequate, the Petitioners did not know and made no effort to ascertain.

The contention of Petitioners that the Company will be unjustly enriched at the expense of consumers by the use of an interest rate different from the rate of return, would be true only if the depreciation reserve were not treated as a source of funds in the determination of a fair and reasonable rate of return. The Petitioners cite Paragraph 16 of the Act creating the Commission to support their contention that the interest rate of 4% on the retirement reserve is unlawful. This contention can be supported only on the false assumption that all moneys invested in the plant are at a uniform rate, that is to say, that bonds, preferred stock, common stock and the depreciation reserve are entitled to a uniform rate of 6½%. But this is not true. Bonds, preferred stock, common stock and the depreciation reserve do not carry the same interest or dividend rates. The rate of return is predicated upon a consideration of the cost of the various types of capital invested in the property, and in fixing that rate, the interest rate of 4% on the reserve balance was given its proper weight

along with the interest rate on long-term debt, the dividend rate on preferred stock and the reasonable return on the common stock equity. The primary rate of return fixed by the Commission in Order No. 2682, referred to by the Petitioners on page 53 of their brief, was determined upon a consideration of these factors, including the interest rate of 4% on the depreciation reserve. If the interest rate on the reserve balance were increased to 6½%, the rate of return would likewise have to be increased to some extent to prevent a diminution of return on other sources of capital.

It is not true that the Company earns 6% on its rate base. It hasn't for more than two years. That part of the rate base created by the use of the money set aside as a depreciation reserve earns only 4%, the rate fixed by the Commission. So long as that continues, the provisions of Paragraph 16 are fully complied with. The Commission was fully aware of the provisions of Paragraph 16 when the plan was promulgated and the interest of 4% on the reserve was fixed as a proper amount and, as previously stated herein, has been approved by the District Court of the United States for the District of Columbia. The Petitioners made no study of the actual depreciation of the Company's property or its expected life, as the the Federal Power Commission did in the *Natural Gas Pipeline* case. Their witness, at the "suggestion" of his counsel (R. I, 160), blindly assumed a life of 43 years for a growing piece of property that has been in existence since 1848, and, as the evidence of record shows, the Company anticipates an expansion of its facilities. The refusal to change the method of determining depreciation accruals from that which was found after investigation and hearing to be an appropriate method, does not constitute a denial of a full and fair hearing. Neither does it constitute arbitrary and illegal action.

Under the statutory standard of determining just and reasonable rates, it is the result reached, "not the method em-

ployed which is controlling." *Federal Power Commission* v. *Hope Natural Gas Co.*, *supra*, and authorities there cited.

The determination of whether the Commission should adopt a service life method of determining depreciation or a sinking fund method is a matter that is committed to a regulatory body best qualified to pass upon the complex questions involved in rate making. In such matters, judicial action cannot supplant the discretionary action of the administrative body. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 691; *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, October Term, 1943; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353; *Armour & Company* v. *Alton Railroad Company*, 312 U.S. 195, 200, 201.

The Petitioners assert (page 46) that the Company is being unjustly enriched by over $225,000 annually on the assumption that the dissenting Commissioner "has estimated with a substantial degree of accuracy" the accrued depreciation. In making this bold assertion, which is contrary to facts of record, the Petitioners fail to state that the figures they quote were not only unsupported by testimony of any witness, but are actually contrary to the evidence of witnesses of both the Company and the Commission. Regulatory bodies and courts do not take unsupported "estimates", even when they are made by experts, as findings of fact. This Court condemned findings by a regulatory body when they were not based upon evidence. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63 *Ohio Utilities Co.* v. *Public Utilities Commission*; 267 U. S. 359; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; *Northern Pacific Ry. Co.* v. *Dept. of Public Works*, 268 U. S. 39.

The so-called "estimated" reserve for depreciation was taken from page 37 of the dissenting opinion in the rate case involving the year 1943. On the same page of that dissenting opinion, it was stated that the reserve for depreciation should

be increased by approximately $4,236,000. By letter dated January 7, 1944, that "estimated" depreciation was reduced to $2,767,600 without additional testimony on the subject, or without statement of reasons for the reduction of approximately one-half. This illustrates the infirmities of making estimates without supporting data.

The Sliding Scale Arrangement Was Adopted after Careful Investigation, Hearing and Consideration.

In the statement of the case (page 9), the Petitioners say that the Commission approved the sliding scale arrangement as proposed by the Company. The apparent inference left to be drawn from that statement is that the Commission blindly accepted a plan proposed by the Company, which is contrary to fact. A sliding scale plan had been the subject of study for years by the Commission and by Citizens' Associations, and the plan adopted was one that was worked out by the Commission's staff, Peoples' Counsel and representatives from Citizen's Associations and the Company. (R. II, 439.)

Indeed, Paragraph 18 of the Act provides that a public utility, with the consent of the Commission, may provide a sliding scale of rates, but that paragraph provides that such plan may not be lawful until it is found by the Commission, after investigation, to be reasonable and just. The plan was adopted after years of study, investigation and hearing and was found to be fair.

The Petitioners also state on page 9 in their statement of the case, that the Commission entered an order fixing $15,039,000 as the fair value of the undepreciated property of the Company as of June 30, 1935. Petitioners then state that the sliding scale arrangement adopted by the Commission prescribed an undepreciated rate base of $21,000,000. Why the Petitioners attempted to tie the sliding scale rate base of $21,000,000 with a fair value of $15,039,000 of the Washington Gas Light Company is difficult to understand. The fair

value of $15,039,000 fixed by the Commission was not the value as of June 30, 1935, as stated by Petitioners, but was the value as of June 30, 1932, and does not include the finding of fair value of $1,954,000 for the Georgetown Gaslight Company as of June 30, 1932, or the value of the property of the Prince Georges Gas Corporation. The $21,000,000 rate base fixed in the sliding scale plan included the fair value of the property of the Washington Gas Light Company, the Georgetown Gaslight Company and the Prince Georges Gas Corporation, as well as the cost of net additions of property during the period from July 1, 1932, to June 30, 1935.

Furthermore, the statement of the Petitioners that the Commission entered an order fixing $15,039,000 as the fair value of the undepreciated property of the Company is contrary to fact. In Order No. 1341 (Exhibit "A"), the Commission found reproduction cost new of property of the Washington Gas Light Company, other than land, used and useful in furnishing gas service in the District of Columbia, to be $15,550,000. It also found the fair value of land used and useful to be $1,654,846. In arriving at the fair value figure, working capital of $689,000 was added to the sum of the foregoing figures and depreciation of $2,855,000 was deducted to arrive at the fair value of $15,039,000, quoted by the Petitioners. This finding of fair value, however, then covered only the facilities of the Washington Gas Light Company. As of June 30, 1932, the Commission also valued the facilities of the Georgetown Gaslight Company, Order No. 1342 (Exhibit "B"), which, subsequent to June 30, 1935, was merged with the Washington Gas Light Company. There the Commission found a fair value of $1,954,000 predicated on reproduction cost new of $1,845,000, fair value of land of $158,120, working capital of $133,000 and depreciation of $182,127. The foregoing findings of fair value, together with the cost of the property of the Prince Georges Gas Corporation, which was organized subsequent to June 30, 1932, and whose facilities were constructed between that date and June 30, 1935, at a

cost, as of that date, of $830,150.03, and additions to the property of the Washington Gas Light Company and the Georgetown Gaslight Company from July 1, 1932, to June 30, 1935, at cost, were the factors upon which the rate base of $21,000,000 was predicated.

While Petitioners have stated that the sliding scale plan provides that the initial rate base should be brought up-to-date annually by means of adjustments for net additions to property less consumers' contributions and less allowances for the proportion of property used outside the District of Columbia, they have failed to state that the plan contemplates a rate base at actual cost of property. They also failed to state that all additions are made at actual cost, and that retirements are made on the basis at which the property is included in the initial $21,000,000 rate base.

The Petitioners fail to state that the rate base unweighted on June 30, 1942, prior to allocation for service rendered outside the District and before including working capital, was $30,701,806.87, as shown by Exhibit No. 1. They failed to state that this amount was arrived at after deduction of $1,737,571.78 for contributions in aid of construction and deposits for extensions of mains. Thus, it is seen that the unweighted rate base on June 30, 1942, is predicated on $32,439,378.65 for gas plant in service. This unweighted base contains $1,055,549.52, representing the difference between the appraised value of land and the original cost. The rate base therefore, in sofaras gas plant in service is concerned, is 96.75% original cost as best it can be determined. The Commission found in Order No. 1341 (Exhibit "A") that the exact original cost of the property could not be determined.

The plan itself provides that additions shall be included in the rate base at actual cost. Since 96.75% of the rate base at the present time represents original cost of property, the rate base is substantially upon the prudent investment theory.

The Price Administrator did not question the calculations

made by the staff in its exhibits (R. II, 392). He offered no testimony on the subject of rate base, except that by Mr. Joseph, who expressly disclaimed any change in the rate base as found by the Commission, when he said "I have not changed the rate base used by the Public Utilities Commission accountants at all" (R. I, 164).

Rate of Return.

In the fourth question presented, the Petitioners say that the Company on its own figures was earning a return of 5% on a substantially undepreciated rate base, after all taxes and excess profits taxes. In their argument, page 79 of their brief, the Petitioners attempt to show that the Company's computation of return of 4.87% was in fact 5% by reason of a change in the provisions of the Revenue Act of 1942, which would reduce the tax liability on an "annual basis" by $36,000. In arriving at the 5% figure, the Petitioners have failed to state that the income under discussion is for the test year ended June 30, 1942, and that the $36,000 reduction in tax liability, referred to on page 79, is for the calendar year 1942 and only one-half of this reduction would therefore apply to the net income of $1,366,119, and not on an "annual basis" as stated by the Petitioners. The remainder of this amount would be reflected in the income for the test year ended June 30, 1943.

That the tax liability was not reduced on an "annual basis", as stated by the Petitioners on page 79 of their brief, is shown by the testimony of the Company's witness, and further shown by a question on cross-examination by counsel for the Petitioners when he asked the witness if the $526,000 was on an annual basis. The witness answered, "It is for the 12 months ending June 30, 1942" (R. I, 226).

By making two adjustments, (1) by adopting a sinking fund method and (2) by calculating taxes at 19%, the Petitioners by their own testimony found there should have been a rate

reduction of $47,668 (page 80 of the brief, Exhibit No. 8, R. II, 420). As further support for their contention that no rate increase was justified, they say on page 80 of their brief that the dissenting Commissioner, "after giving effect" to the matters they discussed in their brief and other factors, concluded that a rate reduction of approximately $1,000,000 was justified. A difference between $47,668 and $1,000,000 is so unreasonable as to show that neither calculation can be based upon the same considerations. No two individuals searching for the truth could from the same evidence arrive at such a colossal difference. The conclusion that a rate reduction of $1,000,000 was justified was not supported by a single word of evidence, and is in direct conflict with the testimony of the Chief Accountant of the Commission and the Company's witness.

The Petitioners have cited regulatory authorities fixing a rate of return of less than 6½%. They did not cite decisions by the Federal Power Commission, which has consistently allowed a rate of return of 6½% for gas companies. Furthermore, the regulatory authorities cited do not make annual adjustments of rates to keep abreast of current operating experiences, such as is done under the sliding scale plan.

On page 85 of their brief, the Petitioners say that on February 18, after the Commission's order had been set aside by the District Court, the Company sold 3¾% refunding mortgage bonds. The inference sought to be drawn is that the setting aside of the order made the bonds marketable. The Petitioners could hardly believe that between the date the District Court vacated the order on February 1 and February 18, the Company had been able to institute a bond selling program. On page 47 of their brief, the Petitioners say the Commission went outside the record to show in its opinion the earnings of the Company. The finding of the Commission in this respect is based upon the proceedings in two finance dockets before the Commission, which were received in evidence as Exhibit No. 3.

On pages 86 and 87 of their brief, the Petitioners set forth

facts which clearly demonstrate the advantages of the sliding scale plan. On page 86, the Petitioners point out that in 1931, the worst year of the depression, the Company earned 10.6%. On the next page they show that between 1936 and 1941, after the establishment of the sliding scale plan, the Company earned an average return of 6.86%. A reduction from 10.6% in the worst year of the depression to an average of 6.86% under the provisions of the sliding scale plan is convincing evidence of the effectiveness and the advantage of the sliding scale plan. In 1941, the Company earned 6.01%. In 1942, it earned 5.10%, after disregarding all excess profits taxes.

For the purpose of showing that the Company's financial position did not justify a rate increase, the Petitioners assert on page 87 of their brief that the depreciation reserve increased from $879,289 as of December 31, 1936, to $2,171,608 on December 31, 1941. These figures are shown on the Price Administrator's Exhibit No. 10 (R. II, 421), and are taken from the Company's annual report to its stockholders. The depreciation reserve shown in the report to stockholders, of course, is the corporate depreciation reserve and is not the same as the reserve determined under the sliding scale plan. But in making the comparison between the depreciation reserve of 1936 and 1941, the Petitioners fail to show the difference in the rate base between those two periods.

The Petitioners cite the testimony of the Price Administrator's witness Riley, that it was the practice of the Administrator to consider profits before Federal income taxes in determining the reasonableness of maximum prices under the stabilization legislation (page 892). On page 94, they say the general commercial practice is not to consider income taxes as an element of cost in the determination of the cost of production. The practice of the Price Administrator in fixing maximum prices deals with unregulated companies and not with common carriers and other public utilities that are already subject to strict State and Federal regulation. The commercial or unregulated companies are not limited to a fixed

earnings' rate as are common carriers and other public utilities. Commercial enterprises, prior to the Emergency Price Control Act, were free to make whatever profit and whatever rate of return their business would justify, but common carriers and other public utilities have not been free to make unwarranted and speculative profits and to engage in speculative practice.

On page 88, Petitioners infer that the small amount of the increase in rates had little or no effect on the ability of the Company to sell its securities. This inference completely ignores one of the most significant facts involved in this case. It was not the size of the increase nor the immediate effect on income that was important to the successful selling of securities. This was the first time under the sliding scale arrangement that an increase was indicated; hence the important question was whether the Commission would adhere to the arrangement. The integrity of the Commission was at stake.

The Commission's Order Is Not in Conflict with the Government's Program to Prevent Inflation.

The Petitioners alleged in their petitions of appeal and have argued below and here that the Commission's order is illegal because it was entered in disregard of the Government's program to prevent inflation and without consideration of economic conditions. This Court said in *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 400, *and Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87, that it must look to the regulatory body's order to see what it did. In *Mississippi aVlley Barge Line Co.* v. *United States*, 292 U. S. 282, 287, this Court said the care and patience with which the regulatory body fulfilled its appointed task are plain, "even to the casual reader, upon the face of its report".

The casual reader will find upon the face of the order here under attack, a complete negation of the allegations and assertions of the Petitioners that the Commission's order is in disregard of the Government's program and without consider-

tion of economic conditions. The care and patience with which the Commission fulfilled its appointed task in the instant proceeding are plainly evident from the facts of record. It reopened the proceedings on two separate occasions. It granted continuances for the purpose of permitting counsel for the Petitioners to prepare testimony and to prepare cross-examination. It gave consideration to the most recent economic conditions. The exact care and regard which the Commission gave to the Government's policy to prevent inflation may be measured in dollars and cents in the application of the sliding scale plan alone. The Chief Accountant testified that in accordance with the calculations under the sliding scale arrangement, after disregarding all excess profits taxes, the Company was entitled to a rate increase of $324,718.06 and the Company's computation indicated an increase of $381,597 (R. I, 40-41). Out of regard for the emergency conditions, the Commission disregarded all excess profits taxes and in that respect sustained an adjustment eliminating excess profits taxes in the amount of $43,928.02 (R. I, 45, 49). Because of "present-day conditions" and after weighing all factors to the best of its ability, the Commission disallowed Federal income taxes in excess of 31% of the tax liability, which made another adjustment in the calculations under the plan of $115,863.09, and an item of $4,929.39 which under Section 6 of the sliding scale plan would have been included as an operating expense (R. I, 48, 49).

In addition to the foregoing, the Commission provided that, if the increase in rates it had authorized resulted in liability for excess profits taxes, all such increases should be refunded to the rate payers (R. I, 56-57). As a result of this provision of the order, all increases in rates between November 16, 1942, when the rates were put into effect, and December 31, 1942, were refunded to rate payers.

The weight to be given to the evidence is for the administrative body. In order to say that the adjustments made by the Commission were not in the proper amounts, the Court would

have to substitute its opinion for the amount of consideration that the Commission must give to all of the factors. It is not the function of the Court to make administrative findings of this character. While the Petitioners offered no testimony on the justness or reasonableness of the rates or what constituted proper rates, and even accepted the calculations made by the Commission's staff, they have argued that the Commission's findings are illegal. These arguments are not sufficient to cause this Court to act as an administrative tribunal to try the facts.

The Commission found that labor costs included in operating expenses for the test year exceeded labor costs for the prior test year by more than $300,000 (R. I, 51). The District of Columbia Gas Workers' Union stated that it had secured a raise in wages based upon the cost of living index, which was approximately a 16% increase in wages, or about $380,000 (R. I, 109). The increase in revenues from the increase in rates authorized was calculated to produce approximately $200,000, or approximately $180,000 less than the increase in wages paid by the Company to its employees. After making the refund provided for in the order, the increase in wages is more than $200,000 greater than the net increase, by reason of increased rates.

The Government has given recognition to the necessity for increased wages due to the increase in the cost of living index. That is demonstrated in the wage rate increases to coal miners in 1942 and in 1943, the increase to steel workers and to railroad operating employees. A study of price adjustments and commodity price increases made by the Price Administrator indicates that the determination of the Commission made in the light of emergency conditions and the various factors involved in rate making is not in conflict with the Government's program as established by the Office of Price Administration. Hundreds of price adjustments have been made by that office increasing commodity prices, but none has taken the form of a detailed and exhaustive investigation and hearings involving

all the basic factors that the Price Administrator's counsel contended in this proceeding were necessary to make a determination.

To illustrate that the Commission's action was not in disregard of the Government's program, the increase in the price of fuel oil for heating purposes in the tank wagon area of Washington, and the increase in the price of Pennsylvania anthracite may be considered. Fuel oil for heating purposes is used by approximately 60,000 consumers in the Washington area, compared with about 25,000 consumers of gas for space heating. An increase in the price of fuel oil would therefore affect more consumers and would have a much greater inflationary effect than would the increase in the price of gas for space heating. The Price Administrator increased the price of No. 2 fuel oil in the tank wagon area of Washington on February 2, 1942, to 7.6¢ (7 F. R. 720). On June 27, 1942, he increased the price to 10.2¢ (7 F. R. 4857), an increase of more than 34% over the February price. On August 3, 1942, he reduced the price to 9.1¢ (7 F. R. 6057). The August price was nearly 20% higher than the February price. Subsequently the price of No. 2 fuel oil was increased to 9.4¢, which is the present price and is approximately 23½% higher than the price in February, 1942. On January 31, 1944, the Price Administrator issued Amendment No. 3 to RO No. 47, under RMPR No. 22, effective February 1, 1944, increasing maximum prices of all sizes of Pennsylvania anthracite by 45¢ per net ton, or by 50¢ per gross ton; to absorb additional cost of wages to the miners. (This order had not been filed with the Federal Register when this brief was written.)

Justifiable increases in the price of commodities are not prohibited by the Emergency Price Control Act as amended, as has been demonstrated on many occasions by competent Governmental agencies. All increases are not contrary to the Government's program.

The Effect of Invalidation of Order No. 2401 in the Annual Application of the Sliding Scale Plan.

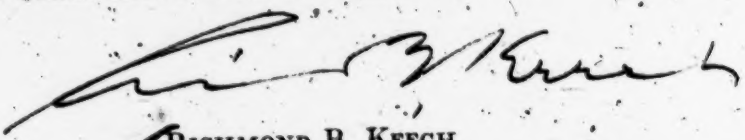
The sliding scale plan is a means of current adjustment of rates based upon current conditions. It does not permit a fixed rate for an indefinite period. Under the terms of the plan, the Commission on April 2, 1943, issued its Order No. 2554, calling for the annual investigation of rates of the Company under the provisions of the sliding scale plan, and on August 21, 1943, notice of hearing was issued. Hearings were held in August, September and November, 1943, as a result of which the Commission issued its Order No. 2682, reducing rates in the amount of $135,416.91 for the rate year beginning September 1, 1943. The calculations were based upon the operating experience and revenues of the Company for the test year July 1, 1942, to June 30, 1943, while the rates prescribed by Order No. 2401, here under attack, were in effect. The practical effect of the decrease effected by Order No. 2682 is to wipe out the previous increase.

CONCLUSION

The Commission received the Petitioners' evidence and considered it together with all other evidence of record. The Emergency Price Control Act as amended by the Act of October 2, 1942, was complied with, in both letter and spirit. The Commission made its findings upon the evidence of record.

The Commission in this proceeding anticipated the purposes of the Act of October 2, 1942, even before it was enacted, and acted in its deliberate and considered judgment in the light of the Government's policy to prevent inflation and to stabilize the cost of living.

It is respectfully submitted that for the foregoing reasons the judgment of the court below should be affirmed and the validity of the Commission's order sustained.



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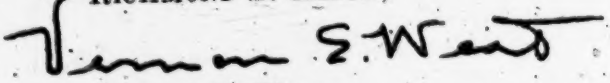

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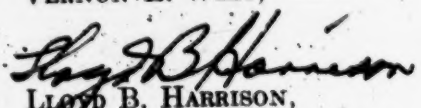

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No. 396

Supreme Court of the United States

OCTOBER TERM, 1943.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER,

v.

WASHINGTON GAS LIGHT COMPANY.

FRED M. VINSON, DIRECTOR OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER.

v.

WASHINGTON GAS LIGHT COMPANY.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, PETITIONER.

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

JOHN H. CONNAUGHTON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 396.

FRED M. VINSON, ET AL.,

v.

WASHINGTON GAS LIGHT CO.,
AND THREE OTHER CASES INVOLVING APPEALS FROM THE PROCEEDING OF THE PUBLIC UTILITIES COMMISSION IN FIXING GAS RATES UNDER THE SLIDING-SCALE.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE ON BEHALF OF THE FEDERATION OF CITIZENS' ASSOCIATIONS OF THE DISTRICT OF COLUMBIA.

Comes now, your petitioner John H. Connaughton, a Member of the Bar of this Court and respectfully petitions the Court for permission to file the accompanying Brief in said cause and have the same considered by this Court in connection with this review.

There is submitted with the original Brief filed herein original letter from Chas. Fahy, Solicitor General of the Department of Justice, and letters from Counsel for the Public Utilities Commission and the Washington Gas Light Co. which are all the parties to this proceeding, consenting to this request.

Respectfully submitted,

JOHN H. CONNAUGHTON,
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Washington, D. C.

IN THE

Supreme Court of the United States

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF AMICUS CURIAE.

STATEMENT.

We desire to submit this short additional statement of the case, in order to present what we believe to be the issues here involved.

It is especially important to note that on Dec. 13, 1935 an Order was entered by the Public Utilities Commission of the District of Columbia approving a sliding scale arrangement for determining gas rates in Washington City.

This established a rate base as of June 30, 1935. This action was supported by the Peoples' Counsel of the District of Columbia acting on behalf of the people, and has consistently had the support of the people of the District to the present time. They have been and are now entirely satisfied with its operation, and desire to continue its benefits.

The proceeding before the Public Utilities Commission from which this review is taken, was initiated by a Notice given in conformity with this sliding-scale agreement.

Prior to the enactment of the Act of Oct. 2, 1942, the Administrator of the Office of Price Administration (hereinafter referred to as OPA) had intervened in this proceeding, and had taken full part in the hearings. It is true that such hearing had not proceeded to his liking, as evidenced by the many verbal clashes recorded therein, but nevertheless he had a part in the hearing, and was permitted to introduce evidence and make proper presentation of his contention.

He was accorded every privilege through his Counsel that was accorded any other participant in such proceeding, and his only objection can be that the Commission did not agree with his position as to the limits of the investigation.

Counsel for the Office of Price Administration sought to convert this proceeding, commenced by the giving of the notices he has detailed in his statement, and which was a proceeding in conformity with the sliding-scale agreement, into one, in which the entire rate base would be re-investigated, a new rate base established, and further adjustments made in accordance with his views of rating making procedure.

He sought to make this change in the proceeding without the giving of a new notice or the beginning of a new proceeding, and without producing any evidence that anything would be gained for consumers in such a revaluation proceeding.

This sliding-scale agreement was sponsored by the people of Washington, through their Peoples' Counsel, and has met the hopes of the people for a simple method of rate adjustment which could be accomplished annually, at slight expense, as compared to a valuation proceeding which would cost the consumers from $750,000.00 to $1,000,000.00 per proceeding. The experience in the application of this sliding-scale has been that it costs less than $1,000.00 per annum to make this annual investigation. This is important to the consumers, as the cost thereof finally becomes their burden under the provisions of Sec. 43-412 of the D. C. Code. And this was a proper item for the Commission to consider in determining the course it was to pursue in this matter.

The People of Washington do not want to return to the old antedeluvian periodic rate valuation proceeding, which has been so expensive to them in the past, and which has only allowed rate adjustments at long intervals of time.

SUMMARY OF ARGUMENT.

While the petitioners seem to proceed upon the theory that "they may be heard for their much speaking" it is our conviction that the several questions presented at pages 2 and 3 of their brief, can be fully answered under three separate headings:

First: A consideration of the sliding scale of gas rates approved by the Commission Dec. 13, 1935 under Section 43-317 of the D. C. Code, to ascertain whether the Commission was justified in retaining it as a proper method of determining gas rates for consumers in the District of Columbia; or on the alternative to discard it, and proceed to make a new valuation for rate making purposes, and to investigate every question properly connected with such an investigation.

Second: To analyze the Proposal of the OPA through its intervention in this annual adjustment proceeding, ini-

tiated under notice to adjust the rates, charges, tolls, etc. in accordance with the sliding-scale arrangement. In so doing, ascertain whether such proposal was feasible and reasonably to be productive of any benefits to the consumers above that provided by the sliding scale. And to view all such proposals in the light of an expense to the consumers of approximately $750,000.00 and the possibility that replacement costs would produce a much higher rate base than the one now produced by the sliding scale.

Third: Was there a fair and impartial hearing of the issues involved in the proceeding, and did OPA have a fair opportunity to assist the Commission as contemplated by the Act? Or did OPA depart from this duty as set out in the Act and propose a visionary scheme, that was productive of no possible benefits to the consumers?

We should determine whether OPA sought to be helpful in this proceeding, and as an Intervenor in a sliding-scale annual adjustment proceeding, sought to assist the Commission in arriving at a conclusion based upon proper evidence which would carry out the spirit of the Emergency Price Control Act and the Stabilization Act. It was not their duty to control this proceeding, and if unsuccessful in such attempted control, to get mad and refuse "to play ball".

If instead of fighting with the Commission they had been helpfully co-operative much benefit might have been derived from their presence.

ARGUMENT.

The Sliding Scale of Rates.

The sliding scale of gas rates was established by virtue of an order of the Public Utilities Commission, dated Dec. 13, 1935, in accordance with Sec. 43-517 of the D. C. Code, and fixed a rate base of $21,000,000.00 exclusive of working capital, as a beginning point of annual adjustment of rates. This base was established as of June 30, 1935. Under this

plan the accounts of the company have been scrutinized and audited annually, and the base has been kept up to date by adding new property at cost of installation, and by deducting retired property. The earnings of the company have been properly reviewed for each annual period to see that proper charges were made for new installations, and proper deductions made for retirement, and also that proper operating expenses have been allowed, and no over-charges made. This scale was fixed on the basis of a 6½ per cent return to the company, and the rates were adjusted up or down accordingly.

This sliding scale plan operates to add the new accretions at "prudential investment" cost, as their proper valuation is one of the subjects of the annual adjustment. The natural retirement incident to the operation of such properties in the course of time will retire the property in the rate base in 1935, and the remaining property will be valued at the actual prudent cost of investment as determined annually by the Commission. This annual constant supervision also insures a proper consideration of the rights of consumers, by securing to them the lowest possible rate consistent with proper return to the investor, and also insures a fair return to the operating company.

It is our considered opinion that an arrangement of this character is too valuable to the consuming public to be bartered away upon the supposition that a present valuation and readjustment of the rate base *might* secure a reduction in rates. There is the opposite possibility that a valuation proceeding under present high prices might demonstrate that the present fair value of the Gas property is now much more than it was in 1935.

Certainly the property which has been added to the rate base because of additions made necessary by a rapidly expanding war area city, has been charged into the rate base at a higher figure than comparative property already in the rate base. It is also certain that if the property which was in existence in 1935, and still a majority part of the 1935

rate base, were now revalued, that it would command a much higher figure. So the advantage to be secured to consumers by a full rate base investigation is probably ethereal, and non-existent.

Added to the above considerations, the history of the operation of this sliding-scale gas rate arrangement has demonstrated that it has decided advantages to the consumers, because its application has secured for them rate reductions each year since its establishment, except 1937 and 1941 when no changes were made, either up or down. Only once since it was established has there been a raise in rates, and that is the one involved in this proceeding. It is interesting to note, although not germane to this appeal, that the annual investigation of 1943, produced a rate reduction which absorbed all the raise involved here.

There is certainly nothing illegal in the sliding-scale arrangement, even in the light of the Emergency Price Control Act of 1942, or the Stabilization Act of 1942. Neither of these Acts provided for any change in the method of determining utility rates. There are many methods which have been applied in the history of rate making, and the Courts have not chosen one over another, provided that they produce a fair result, and are not confiscatory. In fact this Court said in *Federal Power Commission* v. *National Pipe Line Co.*, 315 U. S. 575:

> "Rate making bodies are not required by the Constitution to follow any single formula or combination of formulas. Once a full hearing has been given, proper findings made and the statutory requirements satisfied, the Courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order as applied and viewed in its entirety produces no arbitrary result, the Court's inquiry is at an end."

There is a zone of reasonableness within which regulatory bodies are free to fix utility rates.

Banton v. *Belt Line Ry. Co.*, 268 U. S. 413-22-23.
Columbia Gas Co. v. *Commission*, 292 U. S. 398-414.
Denver Stock Yards Co. v. *United States*, 304 U. S. 470-483.
Federal Power Commission v. *Hope Natural Gas Co.*, just decided.

There is certainly nothing in the two Acts under consideration here that would disturb this well-established rule.

The principal interest which the Federation of Citizens' Association of the District of Columbia has in this present proceeding is to save for us the sliding-scale arrangement. We do not believe that OPA was justified in condemning its operation since 1935. It may be that slight adjustments might be made, which would improve the position of the consumers, and if so this can be done in a proper manner in the annual adjustments. However, nothing of this character was suggested by the OPA. Their criticism was that under changing conditions the sliding-scale is now outmoded; that its operation was not fair to the consumers.

The OPA suggested no adjustment in the operation of the terms of the sliding scale agreement, nor did they point out particular items that should be adjusted, and suggest the proper method of adjustment.

This sliding-scale is somewhat in the nature of an agreement between the utility and the Commission. Its terms were fixed by the order establishing it in 1935, and an honest attempt has been made to operate in accordance with its terms since that time.

Certainly it has been productive of some good and is not entirely worthless. In fact, it is not so worthless that we are justified in discarding it at this time of "peak" prices and spending approximately $750,000.00 to establish a new rate base, which would probably be subject to as much criticism as the present one, and be based on a much higher valuation.

The citizens of Washington do not want this sliding-scale abrogated on the slight and unsatisfactory showing made

by the OPA or suggested by them as a vague possibility in their brief herein.

The Proposal of the Office of Price Administration.

Regardless of the fact that this proceeding was commenced as an annual investigation of the rates, charges, etc. of the Washington Gas Light Co. as required by the sliding-scale arrangement, petitioner sought to change it to a general rate hearing. It is quite probable that if the sliding-scale arrangement had not provided for such a hearing, that no such action would have been initiated. However, under this arrangement it became the duty of the Commission to make a determination.

There has been much said about what the position of the OPA was before the Commission. When directly accused of desiring to nullify the sliding-scale agreement, they denied any such intention. There was varying criticism, all of which was interpreted as an attack upon the sliding scale as an equitable and fair program from the standpoint of consumers, and this notwithstanding there were no consumers before the Commission objecting to the sliding-scale arrangement.

Consumers had the right under the procedure obtaining to participate in the hearing without formal intervention, and could have asked the abrogation of the sliding-scale agreement. There was an appearance by some misguided individuals, but they were not attacking the sliding-scale agreement. They were asking for some adjustments in its application, which action on their part secured no assistance from the OPA.

The position of the OPA is best summed up by Mr. Justice Soper, in the opinion of the Court, unofficial print, page 14 near the bottom of the page (R. P. 440).

After setting out in consecutive order the contentions of the petitioner boiled down from many pages of random discussion and argument (R. 440), bottom page and top of following page, Circuit Judge Soper continues:

"All of these matters were discussed at great length during the extended hearings before the Commission. They were offered as reasons which, taken together required a complete rate investigation. Indeed all of the subjects were so tied together that no substantial change could be made in one without a survey of the entire field. The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was in no position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails. What he desired was an indefinite postponement of an increase in rates pending an exploratory investigation by the Commission in which he was willing to assist as best he could."

A further study of the position of the petitioner will demonstrate that he asked the Commission to pursue a course in conflict with the D. C. Code, Sec. 43-306.

The statutes in question gave the OPA, as a representative of the President the right to intervene in rate proceedings, where rates were proposd to be raised. These statutes did not change the law as to rate making procedure, but simply gave to the OPA the opportunity to assist the Commission in its labors.

We cannot believe that it was the intention of Congress in enacting these two statutes to require utility companies to operate at a loss, should changing conditions reduce their returns, so that present existing rates would not provide an adequate return. If that were true, the law of diminishing returns would soon deprive the public of the utility service involved and resources of the already over-burdened taxpayers would have to be utilized to supply the loss thus sustained.

The Commission fully considered the position of the Washington Gas Light Co., and the return which had been made under the sliding-scale for the year 1942. It scaled down the figures submitted by its own accountants, and permitted an advance which amounted to about .03 per month per customer. In order to do so, the Commission disallowed income taxes which have heretofore been prop-

erly charged to operating expenses. Certainly the Commission cannot be charged with disregarding the rights of the consumers, when they establish a new rule as to income taxes, which to say the least is very questionable, but in favor of the consumer on this doubtful issue (R. 438 top of page).

The great length to which the Commission investigated the return to the Company, its decline in revenue, expenses of operation, etc. is discussed quite fully by the Court of Appeals at page 12 of its opinion, shown at (R. 438). This consideration showed painstaking action, and its findings based upon competent evidence cannot be disturbed.

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297-304.

Norfolk & Western Railway Co. v. *United States*, 287 U. S. 134.

American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232.

If this finding and conclusion of the Commission was correct, then any lower rate would have been confiscatory. In fact, this rate is bordering upon confiscatory, unless it is a proper conclusion that all taxes in excess of 31 per cent must be borne by the utility. However, that question is not before the court in this case, as that question was not raised by the utility.

However, the petitioner, at times, seems to take the position that there can be no raise in utility rates without the consent of OPA, even though the existing rate might be confiscatory. He seeks to justify this by reference to the Emergency Price Control Act and the Stabilization Act. These Acts did not go to that extent, but simply provided that the OPA could be helpful to the Commission by producing competent evidence to help guide the Commission in its task of determining the lowest reasonable rate. If it was determined that a raise must be granted due to increased cost of production, etc. then OPA could be helpful in assisting the Commission to keep such rate at the low-

est possible level consistent with the continued operation of the utility.

Unless this is the fair construction of the statutes involved, they are unconstitutional, as seeking to take property without due process of law.

A Full and Fair Hearing Was Had in this Proceeding, and One Which Satisfied the Requirements of the Emergency Price Control Act, and the Amendment of Oct. 2, 1942.

We wish it to be thoroughly understood at the outset of this argument, that the Federation of Citizens' Associations of the District of Columbia is interested in securing the lowest gas rate that we can get consistent with existing conditions. We realize that if we are to have the benefit of private industry, that such industries must be permitted to operate on such a basis as to permit the investors to make the average return of other invested capital.

While we are as selfish as any other individuals, we do not desire to "kill the goose that lays the golden egg", and destroy the utility that produces the service involved. We realize that the Public Utilities Commission of the District of Columbia does not have the right or the authority to fix a rate for gas service that is confiscatory. We believe that it is the sincere desire of the Commission to give the people of this District who are consumers of the Washington Gas Light Co. product the lowest reasonable, just, fair and equitable rates that the facts and the law will justify.

We are thoroughly in accord with the atttitude and desires of the majority of the Commission. We dislike to have conditions arise which require even a very slight raise in gas rates in Washington, but the good faith of the Commission is demonstrated by their action in the following year, 1943, in which because of increase in business of the Washington Gas Light Co. they were able to reduce rates to such an extent as to entirely absorb all of the increase granted in 1942.

The situation which presents itself to us in considering this case, is this: the Public Utilities Commission of the District of Columbia had approved a sliding-scale agreement, or as it is called in the Public Utility Act, "a sliding scale of rates", Dec. 13, 1935, and established a rate base as of June 30, 1935 of $21,000,000.00. This action was taken under Sec. 43-317 of the D. C. Code. This sliding scale has operated to the satisfaction of the Company and the consumers since that time, and has resulted in a reduction in rates, except for the years of 1937 and 1941, when there was no change.

There is nothing in the Emergency Price Control Act or the Amendment of Oct. 2, 1942, that would in itself abrogate this sliding-scale, and the Act does not authorize the Office of Price Administration, acting for the President, to abrogate it. There is nothing in the Act or the amendment which would designate what method should be used in rate hearings, or that authorized the OPA to choose a method which it could impose upon the Regulatory Body. The effect of the Emergency Price Control Act was to require a full and fair hearing which existing law already required, and to allow the OPA to intervene for the purpose of presenting evidence as to the inflationary effect of a proposed raise in rates. The Act did not repeal the District of Columbia Code Section 43-317, or any other part of the Public Utilities Act. A sliding-scale arrangement is still lawful under this Act.

In short, the law regarding utility hearings was the same as before the passage of the Emergency Price Control Act, except that the OPA was permitted to intervene.

The purpose of that intervention is to permit the OPA to introduce evidence upon the question of inflation. The Emergency Price Control Act did not forbid all raises in rates, but required that such raises should only be made when absolutely necessary. The purpose was to provide an advisory agency with a national overall picture of the economic field to assist the Commission by producing evi-

dence gleaned from its national experience with the subject.

The Act, so far as it applies to public utility rates, reads as follows:

50 U. S. C. Appen. Sec. 961, in so far as applicable, reads as follows:

> "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase." (56 Stat. 765, Oct. 2, 1942, Ch. 578, Sec. 1.)

The Act to which this was supplemental and amendatory, reads in part as follows:

50 U. S. C. 942 Appendix, so far as it concerns this subject:

> "942. Definitions.
>
> (c) The term "commodity" means commodity, articles, products, and materials, (———) and it also includes services rendered otherwise than as an employee in connection with processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity; Provided, that nothing in this Act shall be construed to authorize the regulation of (1) * * * (2) rates charged by any common carrier or other public utility,"

The effect of these two quoted sections was first to withhold regulation of utility rates from the President or his

representative, the OPA, and by section 961, *supra*, to provide that in case of a raise in rates thirty days notice must be given to such representative, and consent to the timely intervention of such representative.

That is the full extent to which this legislation goes. It does not forbid raises, if increasing costs require them, but it does require notice to the representative. Intervention must then depend for its definition upon the already established meaning of the word. Intervention certainly does not mean control, as the OPA sought to define it.

The Section which deals with price-fixing grants to the President authority to make "adjustments". The Utility Commission of the country already had this power to adjust utility rates. All interested parties were permitted to intervene by the various utility statutes, as were they so permitted by the D. C. Code. This statute did not allow such intervenors to manage the proceedings but to introduce evidence germane to the issue framed by the Commission.

It is certainly a strained construction to say that the enactment of this legislation in question here would grant to the OPA something different than was contemplated by existing legislation.

The OPA had a fair opportunity to present any germane evidence, but chose to seek to change the proceedings entirely from an annual investigation under the sliding scale to a revaluation proceeding. They did this with full knowledge that present values were the highest in American history. It is hard to understand why they took this position in view of this high cost of replacement, and the expense of such a proceeding, which, according to Judge Soper at page 443 of the Record, in the last paragraph of the opinion, cost the consumers of Washington $750,000.00. Such an investigation now, in view of labor shortage and increased costs, would probably cost considerably more. It is hard for the Federation of Citizens' Associations to believe that the OPA had the best interest of consumers in mind.

In order to determine whether or not the OPA had a full and fair hearing, we must determine what kind of a hearing they requested. If they were simply participating in an annual adjustment of rates, charges, etc. under the sliding scale, then they had a full opportunity to present anything they desired which was germane to this subject. If they were trying to present evidence that had nothing to do with an annual adjustment of rates, charges, etc. under the sliding scale, then such evidence was properly excluded.

If they were seeking a revaluation of the property of the Washington Gas Light Company, and a full re-investigation of its entire rate base, and all subjects incident thereto, they were addressing the Commission upon a subject not before it, in the proceeding initiated by the Commission through the notice to which reference has been made so often here.

If that is the present contention of the OPA, then that was and is an entirely different proceeding than the one we are now considering. In such a case, it was the duty of the OPA to present evidence to the Commission which would prove the necessity and feasibility of such a rate investigation under existing conditions, and a consideration of the high cost of such a proceeding which would have to be borne by the consumers.

If this latter position is the one they now take before this Court they failed utterly to make such a showing as would justify such action. It is not sufficient to show that somebody guesses that such a rate valuation proceeding would probably benefit the consumer.

It would have to clearly appear that such a revaluation would produce a rate reduction. The Commission would not be justified in guessing that a rate reduction might result, and spend $750,000.00 of the consumers money to demonstrate that they had guessed wrong.

It was so apparent to the Commission under consideration of advancing costs of material, rising operating costs, and a general higher level of all items to be considered that such a proposal was not only useless, but highly foolish,

that the Commission properly declined to make such an investigation now.

That is really the issue upon which the OPA says it was denied a fair and full hearing. Stated bluntly, it is this: Was a valuation rate proceeding, in which the whole rate structure, depreciation, etc. would be completely investigated at a probable cost to the consumers of $750,000.00 justified under present conditions? That question was rightly answered in the negative. In connection with the nature of proof offered by the OPA in support of its contention that a valuation, etc. should now be had, the Court of Appeals said (R. P. 441):

> "The Price Administrator made no definite offer of proof in connection with these matters; indeed, he was not in position to do so, as he had not made the laborious calculations and studies that a thorough rate investigation necessarily entails."

That excerpt correctly states the extent to which the OPA sought to assist the Commission in a solution of the problem it proposed.

The Commission gave them a full, fair and equitable hearing and they produced no evidence to justify their contention.

CONCLUSION.

The Federation of Citizens' Associations of the District of Columbia, which has been in operation for many years, and which is composed of 67 member bodies, representing a membership of approximately 70,000 as disclosed by testimony in a recent hearing, desires to inform the Court that the people of Washington, D. C., are entirely satisfied with the sliding-scale of rates for gas consumers, based upon their experience with its operation for over eight years. We have had experience with a sliding-scale of electric rates with the Potomac Electric Power Company, and this too has worked to the lasting benefit of the customers of such Company.

Our experience has led us to the conclusion that an annual adjustment of rates, charges, regulations, operating expenses, etc. is much to be preferred to expensive valuation proceedings, even though they only occur at long intervals of time. The last experience we had with the Potomac Electric Company the valuation proceeding cost us $1,000,000.00 and lasted ten years, and reached this Court twice in the course of final settlement. The valuation proceeding which finally culminated in this sliding-scale agreement here involved lasted several years, and cost the consumers of this company $750,000.00.

We would like to feel that we are through with that kind of experience, and we do not look with favor upon an attack upon this arrangement which has netted us several reductions in gas rates, under the most unfavorable circumstances.

We are constrained to believe that under normal conditions which have not existed since the establishment of this sliding-scale, that much reduction in gas rates will be experienced from year to year. That has been the experience with the sliding-scale in effect with the Potomac Electric Company where an operation of 20 years, with them has produced rate reductions for that period totalling more than $90,000,000.00 saved to the consumers of electricity in Washington.

The Public Utilities Commission of the District of Columbia had all of this information before it, when it passed upon the application of the OPA in this case to make a complete revaluation of the entire properties of the Gas Company. They now disclaim any such desire, but it is well to read just what they said during the hearing.

Instead of being helpful in seeking adjustments of the sliding-scale to eliminate inequities, they referred to the sliding-scale as the "sacred cow" of the Citizens' Associations.

It is one thing to criticize the sliding-scale, and quite another to offer helpful evidence to adjust inequities. The

former, the OPA did as evidenced by a voluminous record, which was largely unnecessarily contributed by this criticism rather than producing helpful assisting evidence to revise the sliding-scale along proper lines.

We respectfully suggest to this Court that there is nothing wrong with this sliding scale that cannot be properly adjusted and saved to the consumers. And certainly nothing was suggested in the way of evidence that would assist the Commission one particle in making a proper adjustment.

There was plenty said by way of argument, but argument does not constitute a foundation upon which the Commission can base findings of fact. It is necessary to produce evidence.

Much has been said about the denial of a fair hearing. The fairness to be observed is toward the consumers of the Gas Company, and a proper consideration of the question of inflation. The OPA has no other interest in this proceeding.

When invited to make a showing upon the inflationary effect of the proposed action of the Commission, the OPA did not produce or tender any evidence upon this subject.

If it, the OPA, as distinguished from the consumers of gas, were denied a fair hearing, it was because of their own neglect and refusal to co-operate with the Commission to assist it in reaching a fair conclusion based upon the evidence. Their attitude was rather that of demanding, first a revaluation, and second, that no raise in rates be allowed regardless of what the evidence might show.

The OPA chose to ally themselves with the minority Commissioner in an effort to embarass the majority of the Commission in a proper performance of its duty.

Had the Commission followed the leading of the OPA and made findings based upon such evidence as they produced and have ignored the findings and computations of the accountants and experts of the Commission, their find-

ings unsupported by any evidence would have been subject to annullment.

The Commission accorded to all parties a fair opportunity to produce anything they considered germane to the issues involved; examined the books and records of the Gas Company and made such adjustments as the evidence justified, and then applied the facts disclosed to produce the findings which are the basis of its final adjudication.

The only challenge of a fair hearing to the OPA, which is not a consumer and does not represent any consumer interests, but is simply an emergency to help stabilize prices, that can be made, is that the proceeding was not converted into a thorough rate revaluation proceeding in which the Commission would have began an expert revaluation of the properties of the Gas Company, and concluded such proceeding in the next half dozen years, at an expense of from three-quarters to a million dollars, which we consumers would have had to pay through an allowance as a proper operating expense under the D. C. Code. That refusal was certainly not erroneous, but was the exercise of good judgment in the interest of such consumers.

We say again, that if OPA failed to get a fair hearing under its interpretation of what a fair hearing is, it was because of its own conduct in not showing the necessity for such a drastic and far-reaching proceeding in the midst of a war emergency; and because, of course, it could not make a showing of substantial evidence which would justify so ridiculous course of action. Such a request disregarded economic stabilization and the best interest of consumers, who pay the bills. The expenditure of $750,000.00 cannot be justified as a proper stabilization item of evidence.

Every unnecessary expenditure of money and employment of man-power must be consistently avoided in this time of emergency. Certainly representatives of OPA did not realize the effect of their request or they would not have insisted upon such a course in this proceeding.

We submit that there was no error in the proceedings of the Commission in this hearing at issue here, and that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 396.—October Term, 1943.

Fred M. Vinson, Director of Economic Stabilization, etc., et al., Petitioners,
vs.
Washington Gas Light Company and Public Utilities Commission of the District of Columbia.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 27, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

Certiorari was granted in this case, at the instance of the Director of Economic Stabilization and the Administrator, Office of Price Administration, of the United States, to review a rate order of the Public Utilities Commission of the District of Columbia. The application and effect of the Emergency Price Control Act of 1942,[1] and the Act of October 2, 1942,[2] are involved.

The petitioners, who were intervenors before the Commission, appealed from its order to the District Court of the District of Columbia, which set aside the order as arbitrary and illegal.[3] The Court of Appeals for the District of Columbia reversed the District Court.[4] Understanding of the questions presented requires a detailed statement of their historical background.

The Commission was created, and its powers and duties defined by Act of Congress in 1913, supplemented in 1926, 1935, and 1939.[5] References will be to the District of Columbia Code, 1940 edition. The statutes require public utilities within the District to furnish safe and adequate facilities, just and reasonable service, at reasonable, just and nondiscriminatory rates, and to obey the lawful orders of the Commission (§ 43-301). There are detailed

[1] 56 Stat. 23.
[2] 56 Stat. 765.
[3] 48 F. Supp. 703.
[4] 137 F. 2d 547.
[5] c. 150, 37 Stat. 974; c. 8, 44 Stat. 920; c. 742, 49 Stat. 882; c. 40, 53 Stat. 569. D. C. Code, 1940 Ed. Tit. 43 §§ 101-1006.

provisions respecting rates and depreciation (§ 43-315). For the purpose of its functions, the Commission is directed to value "the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation." (§ 43-306.) Nothing in the statute is to be "taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested." But no such arrangement is lawful until found by the Commission, after investigation, to be reasonable, just, and not inconsistent with the purposes of the Act. Such arrangement must operate under the supervision and regulation of the Commission, may be altered and amended, and may be terminated by the Commission (§ 43-317). Usual powers to fix rates, charges, and make rules and regulations are conferred (§ 43-411). The Commission may make rules and regulations to govern its proceedings and to regulate the mode and manner of investigations and hearings before it (§ 43-402). Appeal from its orders is authorized, and the scope of review defined (§§ 43-705 to 43-706).

Pursuant to its authority, the Commission initiated in 1931, and concluded in 1935 a proceeding for the valuation of the property of the Washington Gas Light Company, at an expense of some $750,000, and arrived at a depreciated rate base as of 1932. It then entered upon a further inquiry as to rates. After this had lasted some time it approved and adopted a sliding scale arrangement, which involved a rate base, to be adjusted annually by adding net property additions at cost, a rate of return, and a rate of accrual to retirement reserve, in the light of which the rates of the company were to be adjusted annually. It found that the plan was practical and would be advantageous to all parties interested. This plan calls for an annual determination of the rate of return earned during the "test year", and of the amount available for rate increase or decrease for the succeeding "rate year" and schedules and regulations to accomplish such increase or decrease. Such determination is to be made after public notice and opportunity for hearing. The plan defines a rate year as "the twelve months' period from September 1st to August 31st, inclusive," and the test year as "the twelve months'

period ending . . . June 30th preceding the rate year." At the inception of the plan, rates were reduced by some $800,000 annually, and subsequent annual hearings and determinations resulted in rate reductions in each year after 1935, except in 1937 and 1941, when no changes were made.

The duration of the system was not prescribed but in its order the Commission stated that it construed the statute to permit a termination upon reasonable notice, and found that ninety days' written notice of termination by Commission or Company would be reasonable.

March 20, 1942, the Commission issued its order of investigation in conformity with the sliding scale arrangement. After preliminary investigation by its agents and the representatives of the company, the Commission, pursuant to statutory requirement, issued, on July 21, 1942, notice of hearing as to rates, charges, and regulations which were to become effective September 1, 1942, in accordance with the sliding scale arrangement. The Price Administrator was given leave to intervene and was represented at a prehearing conference and at all hearings, and his counsel was permitted to cross-examine witnesses and to offer testimony. These began August 18 and continued on August 19, September 4, 8, 11, and 14, and closed on the last named date. The Commission stated that it would welcome testimony with relation to the aims and purposes of the Office of Price Administration during the national emergency and the relation of those aims and purposes to the proceedings, and expressed the hope that the Administrator, as intervenor, would develop testimony along lines which would enable the Commission to determine whether an increase should be granted in view of the national emergency. The Administrator's counsel offered evidence, cross-examined witnesses, argued and filed a brief.

On application of other parties, the proceedings were reopened and further hearing had September 30th. Counsel for the Administrator participated and filed a second brief. The hearings were again closed, and, October 13, the Commission issued its findings, opinion and order.

The petitioners' standing in the proceedings deserves notice. Section 302(c) of the Emergency Price Control Act of 1942[6] pro-

[6] 56 Stat. 36, 50 U. S. C. § 942(c).

vides: "Nothing in this Act shall be construed to authorize the regulation of . . . rates charged by any common carrier or other public utility."[7] The admission of the Administrator as intervenor was, therefore, not pursuant to statute but was governed by the Commission's rules. The Commission had provided for intervention in its rules. Rule 7.3 is: "The Commission may grant or deny a petition for leave to intervene, or may grant the petition upon such conditions and limitations as it may prescribe." Rule 7.5 is: "The granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties."

After final submission, and before promulgation of the Commission's order, the Emergency Price Control Act was amended by the Act of October 2, 1942, which, while prohibiting the President from suspending that portion of the original Act exempting public utilities from the scope of the statute, provided: "That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

On the showing of the Commission's staff, the company would have been entitled, under the sliding scale, to an increase in rates of $324,718. The increase approved by the Commission was $201,424, effective September 1, 1942. In its order, however, the Commission directed the company's attention to the provisions of the Act of October 2, 1942, and quoted its language. Accordingly the company, October 14, 1942, served notice upon the Director of Economic Stabilization, who had been designated for the purpose by the President, of the proposed increase in rates together with a copy of the Commission's order and later consented to his intervention. The court below has found that the requisite notice and consent to intervention was given by the company in accordance with the Act.

[7] Compare Davies Warehouse Co. v. Bowles, No. 112 October Term 1943.

Counsel who had participated in all the prior proceedings for the Administrator filed with the Commission October 19 a petition in the name of the Administrator, and on behalf of the Director, asking that the Commission vacate its order and reopen the proceedings to allow the Director to intervene. The Commission reopened the proceeding and set a hearing for November 2 "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Economic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by order No. 2401, and intervention is granted for such purpose." When the reopened proceedings came on for hearing, the same counsel who had theretofore participated in behalf of the Administrator appeared before the Commission, offered no witnesses, but renewed a motion previously filed that the proceeding be reopened "without restriction as to the type of evidence to be presented" and that the Commission vacate its order. The motion was denied, the Commission announcing that it was ready to receive evidence in accordance with the order reopening the proceeding. The petitioners offered no evidence. On being asked whether they had any testimony to present in accordance with the order to reopen the proceedings they asked for a continuance so that they might consult their associates. The request was granted. On November 4, counsel recalled a witness for further examination but offered no other evidence. The proceedings were then closed for the third time without the offer of any testimony relating to the national economic policy developed under the Emergency Price Control Act as amended "and the effect thereon of increase in rates or charges of common carriers or other public utilities."

The Commission reconsidered the record and the testimony and, November 9, issued its order in which it reviewed the proceedings and found that the evidence adduced failed to show that the rates authorized by order No. 2401 were unduly inflationary. It denied the Director's petition to vacate the order. Thereafter the company put the new rates into effect as of November 16th. On appeal by the petitioners, the District Court held that the action of the Commission, in the light of the record, was arbitrary and illegal, and vacated the order. The Court of Appeals reversed, holding that the Commission had afforded petitioners full opportunity for a hearing upon any question which, under

the law and the rules of the Commission, was open in the proceeding and that it was not arbitrary or illegal for the Commission, on the record made, to deny the abandonment of the sliding scale plan and the prosecution of an entirely new rate investigation involving fair value, depreciation, rate of return and other elements commonly considered in such an investigation.

The petitioners seek vacation of the order on the ground that the Commission denied them a full and fair hearing. This contention is based upon the substantive contention that under the Acts of January 30 and October 2, 1942, they were entitled to demand that the Commission enlarge the scope of the hearing and convert the inquiry into one whether an increase of rates was necessary to the company to prevent hardship. The Commission, on the other hand, insists that it was entitled to conduct the proceedings in accordance with its statutory powers as they existed prior to 1942, and, at most, accord the petitioners a full hearing as to the effect of any order in its relation to inflation in the war emergency. Thus it appears that the controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances.

In view of the petitioners' insistence that they were entitled, in effect, to control and direct the inquiry without regard to the statutory powers of the Commission, we shall first examine the extent of the authority conferred upon petitioners by Congress.

The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of "commodities", which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase.

It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they

were approved by the President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body "he had nothing to say about its decision", was made and not contradicted on the Senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles*, No. 112 October Term 1943, was careful "to avoid paralyzing or extinguishing local institutions". Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.

If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which was not shown to be necessary to prevent actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra*, as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers.[8] This we are unable to do.

[8] Davies Warehouse Co. *v.* Bowles, *supra*; City of Yonkers *v.* United States, — U. S. —,

The other contention of the petitioners stems from their view as to the effect of the Emergency Price Control Act and the stabilization Act. They insisted below that they were denied a fair hearing because the Commission refused, in the current proceeding, to alter and enlarge the scope and the character of the inquiry. It will be remembered that, under the Commission's existing order, a termination of the sliding scale arrangement required ninety days' written notice. There was no application of any rate payer or any purpose of the Commission in the spring of 1942 to abrogate the arrangement. On the contrary, the Commission gave the required notice for the usual annual adjustment under the plan; and, after the necessary investigations by its agents, gave notice of hearing with respect to such adjustment. At that point, and at a time when no notice of increase of rates was required by any Act of Congress, the Administrator, upon his application, was permitted to intervene in the proceeding.

In his petition, and at the hearings, he asserted and reiterated that he had the right to go into the propriety of the rate base, the operating expenses, including depreciation expenses, taxes, and rate of return, summarizing his demand as "a full and complete inquiry for the purpose of determining what are fair and reasonable rates." . . . The petitioners now insist that their desire was limited to examination of certain factors involved in the sliding scale. But the courts below did not so understand. The District Court, which sustained the appeal, said: "The Commission was requested to reconsider the basic principle of the sliding scale arrangement" . . . . . The Court of Appeals said "the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." These characterizations of the Administrator's contentions before the Commission are supported by the record.

If we consider the petitioners' present position we find that the Commission heard all evidence offered, and says it weighed it. The Administrator urged that the straight line method of depreciation embodied in the sinking fund plan must be discarded in favor of a sinking fund method under the force of de-

cisions of this court, a position unsupported by our cases, and evidence was offered to show the result which would ensue the substitution. Some testimony was adduced as to rate of return, and the Commission's report shows this was considered. In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and over-all conditions in the national economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

The judgment is affirmed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MURPHY concur, dissenting.

This case goes hand in hand with *Davies Warehouse Co.* v. *Bowles*, 321 U. S. —. That decision expanded the "public utility" exemption in the Emergency Price Control Act to include a wide variety of enterprises. The present decision illustrates the value of that preferred treatment.

The Stabilization Act prohibits any "utility" from making "any general increase in its rates or charges which were in effect on September 15, 1942" without giving the President's agent the right to intervene in the proceedings. The present decision goes far towards making that provision ineffective. It allows the commission so to shape the issues of the rate proceeding as to exclude the data most relevant to a determination of whether any rate increase should be allowed. The power of a commission to shape the issues as it desires and to restrict the Director of Economic Stabilization to those issues is not a power which is apt to be neglected. The Director may of course proclaim against rate increases. But he does not need the right to intervene to prove that rate increases are inflationary. That is self-evident. The right to intervene, if it is not a right to introduce relevant data bearing on the true earnings and returns of the utility, is an empty right indeed.

I agree that Congress did not transfer rate-making powers from the commissions to the Director. I agree that Congress must have contemplated that some rate increases might take place or else it would have treated the whole problem quite differently. But I find not the slightest indication that the Director was to be denied a full hearing. And I do not see how a full hearing could be accorded unless he was given the opportunity to establish, if he could, that the case under consideration showed no real hardship, that wartime demands were not causing the company to suffer, that its financial integrity and its ability to render service remained unimpaired, that its property was not being confiscated, that it was not being treated unfairly as compared with other companies.

We are told that this company has an inflated rate base of some $1,000,000. We are told that its excessive charges for depreciation expense were over $225,000 a year as compared with the rate increase of about $200,000 a year. We are told that a full hearing would have disclosed that the company was in fact earning more than 6½%. I do not know what the evidence would show. But an offer of proof in a rate case could not be more relevant.

I believe, moreover, that when Congress halted general rate increases and gave the Director a right to intervene, it did not sanction rate increases regardless of need and regardless of inflationary effect. I think it meant to make utility commissions at least partial participants in the war against inflation and gave them a sector of the front to control. Though it did not remove the established standards for rate-making I do not think it intended utility commissions to proceed in disregard of the requirements of emergency price control and unmindful of the dangers of general rate increases. To the contrary, I think Congress intended that there should be as great an accommodation as possible between the old standards and the new wartime necessities. The failure of the commission to make that accommodation is best illustrated perhaps by its treatment of taxes. The commission allowed the company to deduct as operating expenses all excess profits taxes and income taxes up to and including 31%. That this amount includes wartime taxes is evident from the fact that the highest corporate tax rate which prevailed from 1936 to 1939 was 19%. We all know that the extraordinary expenditures in-

curred for the defense of the nation started with the Revenue Act of 1940. It has been accepted practice to deduct income taxes as well as other taxes from operating expenses in determining rates for public utilities. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 399. But this is war, not business-as-usual. When income taxes are passed on to consumers, the inflationary effect is obvious. And it is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed.